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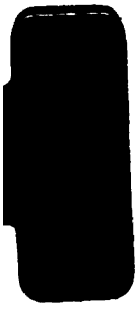

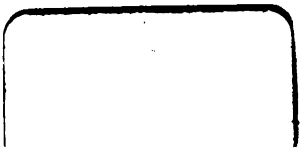

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MARTIN'S

PRACTICE OF CONVEYANCING;

WITH

Forms of Assurances.

BY

CHARLES DAVIDSON,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER AT LAW, AND
FELLOW OF CHRIST'S COLLEGE, CAMBRIDGE.

ECCLESIASTICAL
COMMISSIONERS
FOR ENGLAND
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1844.

ADVERTISEMENT.

THE late Mr. Martin died after having published one Part of the First Volume and the whole of the Second Volume of this Work, but without leaving any materials for the subsequent Parts, or any indication of their intended contents or arrangement beyond that supplied by the short Prospectus, which was originally printed as an advertisement. The present Editor intends to adhere, as nearly as possible, to the plan sketched in that Prospectus; and, accordingly, the present and subsequent Parts will constitute a Work complete in itself, and no further connected with the Parts already published, or with the future Part of the First Volume, than by such references as might be made to any other text-book. The publication of the concluding Part of the First Volume will be postponed till after the publication of the Parts intended to contain the Precedents.

The Editor trusts, that the undue proportion which the notes, in the present Part, bear to the text, will be excused by the nature of some of the Precedents, (Conditions of Sale), and by the consi-

deration, that many explanations and remarks are required in the commencement of a work of this nature, which will not need to be repeated.

The Editor feels great pleasure in expressing his gratitude to the friends who have given him the use of their Precedents and assisted him with their advice. He deeply regrets that he is not permitted to mention their names; as he is well aware, that they would confer a reputation on the Work, which it cannot otherwise be expected to obtain.

6, *Stone Building, Lincoln's Inn,*
January 22nd, 1839.

ERRATA AND ADDENDA.

Page 11, line 11 from bottom, *for* "district," *read* "distinct."
Page 133, note (*q*), line 27 from top, *add* "Ex parte Storey, 2 Nev. & Per. 667."
Page 134, note (*r*), line 5 from top, *for* "101," *read* "111."
Page 207, note, line 11 from top, *for* "Sangster," *read* "Sanxter," *and add* "Skeeles *v.* Shearley, 3 My. & Cra. 112."

CONTENTS.

INTRODUCTION.

Object of the Introduction to explain the Use of the Precedents . . . . . *Page* 1
The Danger of relying on Precedents alone . *ib.*
The Object of legal Instruments is to preserve Evidence in clear and distinct Language . . 2
Rule the First—before a Draft is begun, the whole Design should be conceived 5
Rule the Second—nothing should be omitted or admitted at Random 6
Necessary Results should never be stated . . 7
The Statement of Negatives should be avoided . . 9
Rule the Third—that the Order of the Draft should be logical 10
Narrative Recitals 11
Recitals within Recitals should be avoided . . 12
The Purpose and Manner of framing the introductory Recitals 13
Introductory Recitals should be expressed in general Terms 15
The Order of the operative Parts of Instruments . *ib.*
Rule the Fourth—that the ordinary Forms and technical Language should be used 17
Importance of a Familiarity with technical Language 18
Rule the Fifth—that the Language should be precise and accurate 19
The Manner in which the Collection of Precedents is intended to be used 23
Character of the Notes 25

CONDITIONS OF SALE.

Conditions of sale of freeholds or copyholds. — Common Conditions of Sale of Freehold or Copyhold Estate . . . . . *Page* 29

Agreement for purchase. — Agreement for Purchase at an Auction, to be written at the Foot of, or indorsed on, the Particulars of Sale 36

Agreement for purchase. — Agreement for the Sale, by Private Contract, of a Lot which was not sold at the Auction, the Sale being subject to the same Conditions . . 38

Conditions as to auction duty, interest, &c. — Conditions of Sale as to Auction Duty, Interest, Investment of Deposits, Fixtures, Timber, and Crops 38

Conditions as to time. — Conditions as to Time 42

Conditions as to title deeds. — Conditions as to Title Deeds . . . 44

Conditions as to title and evidence. — Conditions as to Title, and Evidence of Title . 54

Conditions as to assignment and surrender of terms. — Conditions as to the Assignment and Surrender of Terms 64

Conditions as to identity. — Conditions as to Identity . . . 66

Conditions as to incumbrances. — Conditions as to Incumbrances . . . 68

Conditions as to apportionment of rent. — Conditions as to Apportionment of Rent, on the Sale of the Reversion of Property in Lease . . 73

Conditions as to indemnity against rent-charges. — Conditions as to Indemnity against Rent-charges . 75

Conditions as to tithes and commutation rent-charges. — Conditions as to Tithes and Commutation Rent-charges 78

Conditions of Sale of a Leasehold Estate in Lots . 80 — Conditions as to leaseholds.

Special Conditions as to the Sale of Leaseholds . 87 — Conditions as to leaseholds.

Conditions of Sale of Reversionary Interests, Life Interests, and Policies of Assurance . . . 89 — Conditions as to reversions, &c.

Conditions of Sale under a Decree of the Court of Chancery 92 — Conditions of sale under a decree.

Conditions of Sale by Trustees, Mortgagees, and Assignees 95 — Conditions of sale by trustees.

AGREEMENTS.

General Observations . . . . . 98 — General observations.

1. Common Agreement for the Sale of Freehold Estate *ib.* — Sale of freeholds.

2. Agreement for the Sale of a Copyhold Messuage with Fixtures and Furniture . . . 102 — Sale of copyhold house and furniture.

3. Agreement for the Sale of an Infant's Estate, by his Mother and Uncle, and for the Assignment to the Purchaser of a Mortgage on the Estate . . 106 — Sale of an infant's estate.

4. Agreement for the Sale of a Next Presentation to a Rectory . . . . . 113 — Sale of next presentation.

5. Agreement for the Sale of Standing Timber . 118 — Sale of standing timber.

6. Agreement for reference to Arbitration, relative to the Completion of a Purchase . . . . 120 — For reference to arbitration.

7. Agreement for an Exchange by way of Mutual Conveyance . . . . . 135 — For an exchange.

For an exchange and act of parliament. 8. Agreement for an Exchange, and to apply for an Act of Parliament to give effect thereto . . 138

For a partition. 9. Agreement for a Partition of Freeholds and Copyholds by Three Commissioners 142

For a partition and act of parliament. 10. Agreement to make a Partition, and to apply for an Act of Parliament to give effect thereto—the Partition to be made by One Commissioner . . 147

For assignment of an outstanding term. 11. Agreement between Vendor and Purchaser, that within a certain Period the Vendor shall cause to be assigned the Residue of a Term outstanding in the Premises, and which could not be assigned on the Completion of the Purchase, and that the Purchaser shall retain part of the Purchase-money as an Indemnity, until the Assignment 151

For a mortgage. 12. Agreement for a Mortgage . . . 154

To exercise a power of charging. 13. Agreement with an intended Mortgagee to exercise a Power of Charging 161

For settling the construction of a will. 14. Agreement for settling the true Construction of an obscure Will and Codicils, so as to enable the Executors and Trustees to carry the Trusts thereof into Execution, without the aid of a Court of Equity—some of the Cestui que Trusts being Married Women, and one (though twenty-one years of Age) not having attained a vested Interest in the Funds . 163

For obtaining letters patent. 15. Agreement between British Subjects and a Foreigner, for obtaining Letters Patent for an Invention discovered by the Foreigner . . . 182

For leases. Agreements for Leases . . . 191

PURCHASE DEEDS.

16. Conveyance in Fee by Lease and Release; the Vendor being seised in Fee, and his Wife joining for the purpose of releasing her Right of Dower . 192 — Conveyance in fee.

17. Conveyance by Appointment, and Lease and Release, to the common Uses to bar Dower . . 205 — Conveyance to uses to bar dower.

18. Bargain and Sale 218

19. Feoffment . . . . . *ib.* — Feoffment.

Memorandum of Livery of Seisin . . 220 — Memorandum of livery of seisin.

20. Covenant to stand seised . . . . *ib.* — Covenant to stand seised.

21. Conveyance by Appointment under a Power of Sale in a Settlement, of a Manor and other freehold Estate to Uses to bar Dower; the Purchase having been made at an Auction through an Agent who is a Party to the Conveyance . . . 221 — Conveyance under a power of sale.

22. Conveyance in pursuance of a Sale, under a Decree of the Court of Chancery in a Creditor's Suit of a freehold Messuage from the Devisee in Trust and Heir-at-Law of a Testatrix . . 235 — Conveyance under a sale in Chancery.

23. Conveyance on a Purchase under a Decree of the Court of Chancery . . . . 242 — Conveyance on purchase under a decree.

24. Conveyance by a Mortgagee, under a Power of Sale, without the Concurrence of the Mortgagor . 245 — Conveyance by mortgagee, with power of sale.

25. Conveyance by a Mortgagee and a Trustee for Sale of the Equity of Redemption; the Mortgage being kept on Foot for the Benefit of the Purchaser . 250 — Conveyance by mortgagee and trustee, for sale.

Conveyance by mortgagor and mortgagees. 26. Conveyance by Mortgagor and First and Second Mortgagees to Uses to bar Dower in favour of the First Mortgagee, the Purchaser. A Third Mortgagee surrenders a Term of Years, and a former Owner conveys some Property which had been omitted by mistake in a previous Conveyance. . . . 255

Conveyance—assignment and surrender of terms. 27. Conveyance by a Vendor and a Mortgagee of Part of the Estate—the Mortgage Debt and two other Sums secured by two Terms of Years being paid off out of the Purchase-money; one of the Terms is assigned to attend, and the other is merged . 267

Conveyance of freeholds and pews, and enfranchisement of copyholds. 28. Conveyance of Freeholds and Pews in a Parish Church —Enfranchisement of Copyholds—and Release of Quit-rents—the Wife of the Vendor joins for the Purpose of releasing two equitable Rent-charges 272

Conveyance to uses of a settlement. 29. Conveyance to the Uses of a Settlement, on a Purchase by the Trustees . . . 280

Trust to effectuate a contract for sale. 30. Conveyance by a Vendor to Trustees upon Trust, to carry into Effect an existing Contract for Sale, with Power to vary it, or to rescind it and resell the Estate 288

Grant of advowson. 31. Grant of an Advowson by Joint Tenants . 295

Grant of next presentation. 32. Grant by a Tenant for Life, of the next Presentation to a Rectory 300

Covenant to surrender copyholds. 33. Covenant to surrender Copyholds, with Covenants for Title, and with Variations, where the surrender precedes the Covenants for Title . . 304

34. Covenant to surrender Copyholds—Release by a Mortgagee who has not been admitted—Variation where Mortgagee has been admitted . . . 311 — Copyholds with release by mortgagee.

35. Bargain and Sale of Copyholds, under a Power of Sale in a Will . . . . . 319 — Bargain and sale of copyholds.

36. Conveyance of Freeholds and Covenant to surrender Copyholds, where Part of the Purchase-Money remains secured upon the Estate . . 323 — Freeholds and copyholds, part of the purchase money remaining unpaid.

37. Assignment of Leaseholds . . . 333 — Leaseholds.

38. Assignment of Leaseholds by a Mortgagor and his Trustee, and by First and Second Mortgagees, and their Trustee, to Two Purchasers as Tenants in Common . . . . . 339 — Leaseholds to tenants in common.

39. Conveyance to Uses in favour of a Husband and Wife, of Freeholds, Leaseholds, and Copyholds, where the Lands of different Tenures cannot be distinguished, and Part of the Purchase-Money is advanced by Mortgagees.—Declaration that the Land is to be the primary Resort for Payment of the Mortgage . 348 — Freeholds, leaseholds, and copyholds, to mortgagees and purchasers.

40. Assignment of Letters Patent . . 361 — Letters patent.

41. Assignment of Policies of Assurance; part of the Consideration being a Covenant by the Purchaser to pay a Mortgage Debt . . . 367 — Policies of assurance.

42. Assignment of Goodwill and Stock in Trade to Two Co-partners . . . . . 377 — Goodwill and stock in trade.

43. Conveyance in Fee, with the Reservation to the Vendor of the Coal and Rights of Mining . . 393 — Conveyance with reservation of mines.

44. Conveyance by the Mortgagees and Assignees, and the Official Assignee of a Bankrupt . . 410 — Bankrupt's freehold estate.

Bankrupt's leasehold. 45. Assignment of Leaseholds by the Assignees and Official Assignees of a Bankrupt . . . 422

Undivided share of a married woman. 46. Conveyance of the Undivided Share of a Married Woman in Freehold Estate,—Equitable Release of an Annuity 426

Enfranchisement under power. 47. Enfranchisement of Copyholds under a Power in a Settlement 432

To a railway company. 48. Conveyance to a Railway Company . 438

To churchwardens and overseers. 49. Conveyance to the Churchwardens and Overseers of the Poor of a Parish under the Act of the 59 Geo. 3, c. 12, with a Proviso against producing the Title Deeds to the Purchasers, and a Covenant by them to put up and maintain a Fence 442

Merger of tithes. 50. Form of Declaration merging Tithes, under the Statute 6 & 7 Will. 4, c. 71, when such Merger is declared by a separate Instrument . . . 446

Assignment of attendant term. 51. Assignment of a Term already attendant upon the Inheritance to a Trustee for a Purchaser . . 449

Assignment of two attendant terms. 52. Assignment of Two attendant Terms in separate Properties to a Trustee for a Purchaser . . 459

MORTGAGES.

Mortgage in fee. 53. Mortgage in Fee, with Power of Sale . 463

To persons lending on a joint account. 54. Mortgage in Fee to Three Persons who advance the Money on a Joint Account—Power of Sale—Attornment by Mortgagor 480

Mortgage for a time certain. 55. Mortgage in Fee by Appointment, (Short Form)—Proviso that the Mortgage-Money shall not be called in for

a Certain Time—Assignment of a Policy of Fire Insurance and Covenant for Payment of Premiums 494

56. Mortgage by Co-Partners of a Cotton Mill and Machinery to a Joint Stock Bank for securing an Account Current . . . . . 500 — Of a mill and machinery by partners to a joint stock bank.

57. Mortgage of Fee-simple Lands and of Lands in Settlement, subject to a Power of Appointment; the Money being advanced in distinct Sums by Two Sets of Mortgagees—Power of Sale—Proviso as to the Order of Liability between the Mortgagors and the Estates—Trusts of the Money arising from Sale of the Settled Estates . . . . . 524 — Settled land to two sets of mortgagees.

58. Mortgage of Leaseholds by way of Underlease; part of the Money having been previously advanced on a Deposit of the Title-Deeds, during the Investigation of the Title—Power of Sale, with Declaration of Trust of the Reversion which remains in the Mortgagor . . . . . 537 — Leaseholds.

59. Mortgage of Freeholds and Renewable Leaseholds; Proviso for the Reduction of Interest on regular Payment . . . . . 550 — Freeholds and leaseholds.

60. Mortgage of Copyholds . . . 565 — Copyholds.

61. Mortgage of Freeholds and Copyholds . 570 — Freeholds and copyholds.

62. Mortgage by Demise for Part of a Term of Years for securing a Portion . . . 574 — By demise to secure portion.

63. Mortgage of Two Leases of Mines with the Licence of the Lessors; with Restrictions against further Assignments, without fresh Licences—Power of Sale—Provisions for Payment of the Mortgage-Money by Instalments, and of the Postponement of the Payment of Instalments in certain Events—Release by One of the Lessors of a former Breach of Covenant . 581 — Of mine lease: money to be paid by instalments.

Copyholds for an account current. 64. Mortgage of Copyholds, (subject to a Prior Mortgage), to Bankers for securing an Account Current . 597

Reversionary interest in stock. 65. Mortgage of a Reversionary Interest in a Sum of Stock 603

Policy of assurance. 66. Assignment of a Policy of Assurance by way of Mortgage, for securing a Sum already Due and future Advances 610

Collateral security on policy of life-assurance and life-interest. 67. Collateral Security by Mortgage of a Policy of Assurance on the Life of the Mortgagor, and by a Further Charge on the Life-Interest of the Mortgagor in certain Funds 617

Collateral security: covenant to insure life. 68. Collateral Security, by a Charge on the Equity of Redemption, of a Fee-simple Estate and of a Life Estate, and of other Premises—Covenant by the Mortgagor, (if required), to effect and keep on Foot an Assurance on his Life 625

Attendant term in trust for mortgagees. 69. Assignment of an Attendant Term in Trust for a Mortgagee, and to attend the Inheritance . 630

Appointment of receiver. 70. Appointment of a Receiver 631

Further charge. 71. Deed of Further Charge 639

Transfer of freeholds. 72. Transfer of Mortgage of Freeholds . . . 643

Transfer, with further advance. 73. Transfer of Mortgage of Freeholds, the Mortgagor being a Party and receiving a further Advance 651

Transfer, with further advance and assignment of term. 74. Transfer of a Mortgage of Undivided Shares of Freehold Estate and further Advance; the old Mortgage being for a Term of Years, which, on the Transfer, is assigned to Attend the Inheritance, and the New Security being made in Fee-simple—Covenants for Insurance against Fire—Appointment of a Receiver 657

75. Transfer of Mortgage of Copyholds which have not been surrendered, the Mortgagor being Dead and his Devisees Infants . . . . . 667 — Transfer of copyholds not surrendered.

76. Transfer of Mortgage of Copyholds where the Mortgagee has been admitted—The Mortgagor receives a further Advance, and Covenants to surrender Other Copyholds . . . . . 669 — Transfer of copyholds after admittance.

77. Transfer of Mortgage (part of the Debt having been paid off) of Freeholds, Copyholds, (which have been surrendered), and Leaseholds, the Mortgagee being Dead, and his Heir and Administrator joining 672 — Freeholds, copyholds, and leaseholds.

78. Re-conveyance of Mortgaged Premises . 684 — Re-conveyance.

INDEX TO THE NOTES . . . 689

PRECEDENTS IN CONVEYANCING.

INTRODUCTION.

Object of the introduction to explain the use of the precedents.

THE different classes and parts of legal instruments, according to their technical divisions, and the rules of law which apply to them, are discussed in a different part of this work (Vol. I. Books 2 and 3); but it has been deemed expedient to prefix to this part some account of the rules by which the draftsman ought to be guided in the framing of legal instruments, because a right comprehension of these rules is necessary, in order to use, with advantage, the precedents which follow. The subsequent observations assume, that the reader has acquired, from the ordinary sources, a competent knowledge of law; as it is in vain for any one to hope to become a skilful draftsman unless he is tolerably acquainted with the law, so far as it is connected with conveyancing. Without a fair knowledge of the law, of course he can only copy from what others have done before him, and is exposed, at every step, to the danger of falling into errors, the existence of which he cannot perceive.

The danger of relying on precedents alone.

It seems to be often considered that the business of the draftsman is a very easy one; that he has little more to do than to find an appropriate prece-

dent, and then, by changing names and dates, to construct the new instrument required: and, indeed, it is true, that there is a class of draftsmen who draw from the precedents from which their predecessors drew, without knowing why or wherefore, who have little or no knowledge of the commonest practical rules of their art, and not an idea of those general rules or principles on which it depends. But men who trust thus implicitly to their precedents, and remain in ignorance of the rules of their art, are not fit objects of imitation: they may be enabled, by good fortune, to avoid doing any material mischief, so long as they are confined to every-day matters; but when new combinations of circumstances arise, of which precedents afford no example, they are either totally unable to proceed without assistance, or fall into the most pernicious mistakes. Even under the most favourable circumstances their drafts are rude and undigested; as discreditable to their authors as they are disagreeable to peruse and difficult to understand. We recommend a more laborious, but a safer and more creditable, course; and our present object is to explain those principles and rules by which our business is conducted, so as to enable the student of these volumes to employ the precedents they contain in a safe and profitable way; not copying servilely from the page before him, but adapting the forms to the exigency of the case he is required to meet.

The object of legal instruments is to preserve evidence in clear and distinct language.

The great principle on which all legal instruments are, or ought to be, framed, is perfectly simple and intelligible, and is immediately suggested by the

consideration of the object with which such instruments are prepared. This object, of course is, that they may bear witness—may preserve testimony clearly and distinctly respecting the matters to which they relate; and therefore, all that the draftsman has to accomplish, is to state the intentions of the parties in such language as to render them clear and free from ambiguity. To do this, he must first explain the relation of the parties to the subject-matter at the date of the instrument, and then set forth what is intended to be done. Of course, he must follow the forms which the law prescribes: but he must make those forms subservient to his purpose; not be led away from his purpose by the consideration of the forms. It will, indeed, be obvious on reflection, that all instruments, when disembarrassed of their technical divisions, are divisible into two parts:—the first, which explains how the subject-matter stands in relation to the parties who propose to deal with it; and the second, which explains what they intend to do. The first part, in ordinary instruments, prepared according to English forms, includes the parties (*a*) and recitals; the se-

(*a*) In a scientific view, there is no occasion for parties to legal instruments; but they are absolutely necessary, according to English forms. Some of the forms, however, given for conveyances under railway and other acts of parliament, dispense with the parties, without in anywise injuring the symmetry of the draft. The parties, as they now stand in our drafts, convey no information, and are, in fact, merely a repetition of the names in the subsequent parts of the instrument, with the addition of descriptions. It is very usual, however, to add short descriptions of the characters in which the parties act, in order to enable a person who reads them to form an idea of the nature of the draft.

cond, all the subsequent parts of the instrument. The best illustration of this division is a simple deed of arrangement, because it is free from technical forms. In a deed of this nature, the parties are stated in such order as may be convenient, and are followed by recitals of the instruments and circumstances affecting the subject-matter, and the relation of the parties thereto, including an account of the disputes, doubts, and difficulties which have arisen or been suggested, and a statement of the desire of all parties to enter into the subsequent arrangement. Then follows the operative part, which simply bears witness, that it has been agreed by the parties that the subject-matter shall be disposed of in the way it proceeds to mention. If, however, the arrangement be of a complicated nature, the general terms first stated may require to be qualified, and this is effected by means of powers, provisoes, and other like clauses, which complete the evidence of the intentions of the parties, and form subordinate divisions of the second part of the instrument. So, too, it may be necessary to add covenants, that particular persons shall do particular acts, and these will form another division of the second part. And if we dissect any other species of instrument, we shall find that all the different technical divisions which our law or practice prescribes, may be arranged under one or other of the two leading parts we have mentioned. There are, indeed, one or two apparent exceptions to the foregoing rules, but which do not affect the general application of them. One of these is, that when a person is seised in fee simple of an

estate, and intends to convey the inheritance, the recital of his interest in the estate is not inserted in the instrument; but this is because it is understood, that, in the absence of recital, the grantor is assumed to be seised in fee simple; and because his subsequent contract to sell and his conveyance of the inheritance necessarily imply the same fact. So in wills, too, recitals are comparatively rare, because, generally, the testator either disposes of all he possesses, or has the absolute ownership of all he devises or bequeaths. In leases, recitals are generally wanting, partly for the foregoing reasons, and partly because, as the lessor does not shew the nature of his interest or power, it is impossible to explain it in the instrument. On principle, however, leases ought to contain precisely the same recitals as any other instrument of the like nature.

Rule the first—before a draft is begun, the whole design should be conceived.

Recollecting that the object of legal instruments is to bear witness clearly and distinctly respecting the matters to which they relate; and that clearness and distinctness can be attained only by proceeding on a fixed plan, and in regular order, we have no hesitation in laying down the first rule on which the draftsman must act. It is this—that, before any draft is commenced, the whole design of it should be conceived; for if a man proceed without any settled design, it is manifest that his draft will be confused and incoherent; that many things will be done which ought not to be done, and many left undone which ought to be done. He will be puzzled at every step of his progress in determining what ought to be inserted and what to be omitted, and will have

no clue to guide him in his decision, because he does not know what his own object is. Undoubtedly, as he proceeds, he will generally have to alter, more or less, the details of his plan; but if he be possessed of competent skill, and have sufficiently acquainted himself, before he begins, with the state of facts, it is but seldom that he will be compelled to change his general design: and it may be observed, that a general design, on which a considerable part of a draft has been drawn, should never be changed without urgent reason; because, that part of the draft which has been previously prepared, will, unless revised with the most anxious care, be inconsistent with the remainder, and will, in spite of every precaution, frequently retain discrepancies, in reference and otherwise, of the most serious nature. Of course, however, if the original design be found inapplicable, it must be changed, and the mischiefs which have been pointed out be averted, as far as possible, by a careful revision.

Rule the second—nothing should be omitted or admitted at random.

The second rule to be stated is immediately connected with, and is a leading reason for, the observance of the first. It is, that nothing is to be omitted or admitted at random: all that is introduced should have an object and a reason for its introduction, and should be conducive to the general design. In stating facts, we should consider the bearing of each upon our object; and, in reciting instruments, we should scrupulously select such parts only of them as are essential to our purpose. Every sentence we write should have its intent and meaning clearly and distinctly expressed; for if, from trick or care-

lessness, we insert things which are not significant to ourselves, we may be sure they will never be intelligible or satisfactory to others. It is that carelessness, full as much as ignorance, which occasions the verbosity with which legal instruments are reproached; for the draftsman, paying little attention to the precise meaning he desires to express, seeks to conceal his inattention and inaccuracy under a cloud of words. There is nothing which affords clearer evidence of his attention and knowledge, than the absence of those long lists of synonymes and superfluities which too generally disgrace our drafts.

It might be thought that this rule is so obviously useful that it would always be attended to, did not experience prove that there is none which is more frequently neglected and violated. We find powers and provisoes recited, and trusts set forth, without being able to form a conjecture as to the motive; we see forms introduced into drafts, to which they have no application, and qualifying clauses omitted apparently from mere inattention, or because they were not to be found in the precedent which the draftsman had before him. The man, however, who intends to rise to eminence in his profession, must avoid this slovenly habit as he would an error in law; he must think why he inserts or omits every clause that occurs, and be able to give a reason that will satisfy himself and others for every step he takes.

Necessary results should never be stated.

There is one branch of this rule which is of such extensive application, and points so directly against a prevailing error, that it deserves a distinct notice:

we mean the rule, that necessary results should never be recited; that is to say, that consequences which inevitably flow from facts previously stated, should not be expressed. Thus, if we say, A. B. died leaving C. D. his heir at law, it is absurd to add, "him surviving;" because, unless C. D. survived A. B., he could not be heir at law. It has, however, been very usual to transgress this rule, especially in the case of legal inferences; thus, it has been constantly the practice to recite that "A. B. died leaving C. D. his heir at law, and that the said C. D. thereby became seised of or entitled to the said messuage &c.;" and in reciting mortgage transactions we constantly find it stated that "the said sum of £—— was not paid on the day appointed for the payment thereof, whereby the estate of the said [*mortgagee*] became absolute at law but redeemable in equity." Now, in these cases the inferences or results stated are elementary rules of law, with which every one is acquainted, and the expression of which, therefore, gives no information whatever. The draft is quite as intelligible without the statements as with them, and for that reason they should be omitted (*a*).

We have confined the application of the rule to

(*a*) The plan of stating legal inferences from the facts recited, probably owes its origin to an imitation of bills in equity, in which it is said to be desirable to state them, for the sake of founding on the statement an interrogatory to the defendant, which must compel him to admit or to deny the inference. Of course, no such use can be derived in conveyancing from the practice, but it will, probably, be pretty generally retained, as most equity draftsmen, at the present day, practise conveyancing likewise.

recitals; but there can be no doubt that it does bear as cogently on the operative part of the draft, although in practice it is not enforced with regard to that part with equal strictness; and the source of the relaxation is the abundant caution which conveyancers exercise, and which leads them to endeavour by fulness of explanation to exclude the possibility of the necessity of judicial interpretations of their drafts. The motive is a good one, and the precaution often reasonable; but still we cannot hesitate to pronounce that, even in the operative parts of our draft, if the inference, whether legal or otherwise, be certain, we ought not to encumber our draft by setting it forth.

In the application of our forms, attention should be given, to see that the inferences stated in the old forms have not since been rendered superfluous by judicial decision. Thus, on the old principle that estoppel could not be by recital, it was usual to add, after reciting a fact which was particularly intended to bind a party by way of estoppel, "as he [*the party*] doth hereby admit and acknowledge," but this addition is now, by the cases (*a*) which have decided that estoppel may be by recital, rendered unnecessary.

The statement of negatives should be avoided.

It is another branch of the second general rule, that the statement of negatives should generally be avoided; thus, in creating a tenancy in common, it is proper to make the habendum to the grantees "as tenants in common," but it is very superfluous

(*a*) *Lainson* v. *Tremeere*, 1 Ad. & Ell. 792; *Bowman* v. *Taylor*, 2 Ad. & Ell. 278.

to add, as is frequently done, "and not as joint tenants;" thus, too, after stating a mortgage, it is needless to recite that the loan was not repaid on the day appointed; it will be assumed that it was not repaid unless the positive fact of repayment be stated. Again, when we have mentioned two or more co-trustees and one dies, we recite his death, but we do not add, "leaving the said [*co-trustees*] him surviving," because we assume that they continue to live till their death is mentioned. There is, however, a class of cases in which we recite negatives, and that is, when subsequent events depend on a particular event not having happened, and nothing has been mentioned in the draft from which it can be inferred whether the event has or has not happened. Thus, in the case of dealing with an estate which is limited in default of appointment under a power, or in default of issue, it is usual to recite that the power has not been exercised, or that there has been no issue. But the deviation from the rule even in these cases (or at least in the first instance), is of doubtful propriety, and is not followed in many similar instances. As in dealing with an estate which has been in settlement, it is usual to recite not that such and such of the powers have not, but that such and such of them have been exercised.

Rule the third, that the order of the draft should be logical.

The third rule for the draftsman's guidance is, that the order of his draft should be strictly logical. This rule follows directly from the general principle, that legal instruments should be distinct and clear in their testimony, since no composition can be readily understood which is not logical in its order.

A draft, in fact, should be a perfect specimen of reasoning; the recitals stating the premises, and the operative part, the conclusion. The question is, how this may be best accomplished? and the answer will be most satisfactorily given, by stating the chief practical rules by which conveyancers are guided in the arrangement of the matter of their drafts.

Narrative recitals.

The narrative recitals follow next after the parties, and must generally commence at such a period as to shew the creation of all the interests intended to be dealt with. The leading rule for the order of the narrative recitals is, that every instrument and fact should be recited according to the date it bears or at which it occurred. This is obviously the natural order, the one in which we always narrate events, and from which, if we depart, we fall into endless confusion. There are certainly a few instances, in which a rigid adherence to the order of date would lead to the interruption of the natural order, by introducing events foreign to the main narration, as in the case of the assignment of a term in which two district series of recitals often occur; one deducing the title to the fee, the other the representation of the term. But, in nine cases out of ten, the draftsman, by adhering to the order of date, will have the best chance of presenting an intelligible story. Even in many instances, in which the order of date at first appears unnatural, it ultimately turns out to be the true arrangement, as in the case of distinct estates of which the titles are partially but not entirely identical. In this instance, the draftsman is often tempted to endeavour to keep

the recitals of the separate estates quite distinct, and for that purpose to forsake the order of date; but, although such a plan is occasionally successful, and, when successful, is very neat and satisfactory, yet in the greatest part of the cases to which it is applied it fails, and leads to great indistinctness and confusion. An experienced draftsman may trust to his own tact and judgment for indicating the occasions on which he may advantageously lay aside the order of date; but, for the young practitioner, it is the only sure and safe rule; it can very seldom indeed lead him astray, even if for some particular drafts it be not the best possible order.

Recitals within recitals should be avoided.

A necessary consequence of the rule that the recitals should follow each other in order of date is, that recitals within recitals must be avoided. Every instrument and fact must be recited independently, and not given as the copy of a recital in a recited instrument. The opposite course leads to the most bewildering perplexity; the reader continually forgets in what order circumstances occurred, and to what instrument each matter is to be referred, and is totally unable to gain any intelligible view of the subject, till he has in his own mind decomposed and reconstructed the narrative. There is one case, however, in which it is allowable, and usual (though not strictly necessary) to recite matters as copies of the recitals of other instruments; and this is when such matters depend for their authority solely on the instrument in which they are recited, and are not presented to the draftsman as independent facts. Thus, in reciting a deed

of disclaimer of trusts, we may state the fact, that the trustee had not acted in the trusts, by setting forth the recital to that effect, contained in the deed of disclaimer; and in stating the transfer of a mortgage, where the amount or condition of the mortgage debt has been varied, we may state the facts affecting it, by setting forth the recitals in that behalf contained in the deed of transfer. In neither of these cases, however, it will be observed, is the *order of date* deviated from; and, therefore, there is no departure from the general rule, but only from the subordinate rule, where that subordinate ceases to agree with the general rule. In short, it will be perceived, that the rules by which the narrative recitals of drafts are governed, are precisely the same as those by which the narration of any other story is governed; and that the draftsman, in this part of his task, has little more to do than to follow the course which common sense dictates. There are a few precautions to be observed, which depend on the peculiarities of our laws, chiefly in regard to estoppel and notice, and which will be pointed out in the proper places, but which in nowise affect the general principles of which we are now treating.

The purpose and manner of framing the introductory recitals.

Let us next suppose that the narrative recitals are complete, that is, that every instrument and fact which is necessary for explaining the situation of the parties and the subject-matter, with relation to the general design of the subsequent part of the instrument, has been stated in its appropriate order (*a*).

(*a*) There is no absolute test for ascertaining the completeness and correctness of the narrative recitals; the draftsman must trust,

Now, to connect our narrative with the operative part of our instrument, we must state the motives which occasion the subsequent arrangement being entered into. This statement consists of one or more recitals, which immediately precede the operative part, and are termed introductory. If they are more in number than one, they should follow one another in the order in which the intentions they indicate are to be carried into effect. In a purchase deed, the introductory recital is the one which states the contract; in a mortgage, the one which states the agreement for the loan or security; in a voluntary deed, the one which expresses the intention or desire of the grantor to make the subsequent settlement. But a deed of arrangement affords the best example of such recitals; because, in an instrument of that nature, they are necessarily complicated, and of the greatest importance. They first state, in the order of execution, all that is intended to be accomplished, and then set forth, in corresponding succession, the different assignments, bonds, conveyances, transfers, and other deeds and acts which require to be executed or done before the execution of the prin-

on this point, to attention and experience alone, bearing in mind the cardinal principle before referred to, that he must tell every thing which will elucidate, and nothing which will not elucidate, his general design. He must take care to shew in whom the whole estate he is dealing with is vested, and recollect that no others except those persons can be the parties to deal with it. So singular, however, is the want, in some minds, of attention or reasoning power, that it is by no means rare to find a young draftsman frame a set of recitals which shew a title in A. B. and C. D., and make C. D. alone convey, or, *vice versa*, deduce a title to A. B., and make A. B. and C. D. convey.

cipal instrument. The precedent XII. and that of "An assignment of a good will and stock in trade," which appear in this Part, and the precedents which will hereafter appear, of releases and other complicated instruments, will afford examples of the manner of handling these recitals.

Introductory recitals should be expressed in general terms.

In framing introductory recitals, it should be seen that they are expressed in general terms, so as not to qualify or restrain the subsequent parts of the instrument, and that the intention expressed is precisely the same as the intention afterwards carried into effect. If this rule be not rigidly adhered to, it is obvious that the logical order of the draft is altogether destroyed, and great risk is, moreover, incurred, that the deed may be reformed by a court of equity, on the ground of mistake; that is, that the intention of the parties, as expressed in the recitals, may be ordered to be carried into effect in preference to the arrangement actually made by the operative parts. To avoid these dangers, it is a rule almost universal to frame the introductory recitals with a clear but general reference to the corresponding act afterwards done: as thus—"that the hereditaments should be settled to the uses *hereinafter* limited;" "that the parties should enter into the covenants *hereinafter* contained;" "that such release should be executed as is *hereinafter* contained;" and so forth.

The order of the operative parts of instruments.

We come next to the operative parts of instruments, to which the previous parts are merely introductory and subsidiary. It is not necessary for the

present purpose to go into the technical rules by which the order of the parties, and the forms of the testatum and habendum and other parts, are governed. For the purpose of preserving the logical arrangement of the draft, it is only required to observe that the different witnessing parts follow each other in the order in which the corresponding recitals have been arranged, or that, if needful, the disposition of those recitals be changed, so as to agree with that of the witnessing parts. The different provisoes and powers, and other qualifying clauses, should follow as nearly as possible to the matters which they qualify; and generally, all the parts which affect the same interests or matters, or which bear upon each other, should be placed as nearly as possible to each other, so as to present each subject disembarrassed from all the others. The instruments, of which the operative parts are the most complicated and difficult to construct, are settlements and wills. In the great majority of the former, however, the dispositions being pretty nearly similar, the modern draftsman is relieved from most of his labour by the employment of precedents; although great attention is still required in the nice adjustment and adaptation of the settled forms to the new combinations of circumstances which generally present themselves. But in wills, the caprices of testators are so numerous and so strange, that few forms are available for any other purpose than for supplying hints of what may be needful, and recalling the language to our recollection. The dispo-

sition of testators is generally so strong to tie up their property for the longest possible period, to subject it to such extraordinary rules of sale and management, and to divide and charge it in such almost inconceivable ways, that the ingenuity of the draftsman is taxed to the utmost to frame an instrument which shall at the same time be, in point of workmanship and arrangement, creditable to himself, keep within the bounds prescribed by law, and satisfy the caprices of the testator.

In concluding this branch of the subject, we have only to add, that, until the draftsman has attained great experience in his profession, he should never omit to re-peruse his draft after the operative parts are finished. It is certain, that, however skilfully his general design has been formed, and however carefully worked out, he will find numerous inconsistencies, trifling, perhaps, in degree, but which may be easily removed, and which, if suffered to remain, would be a great blemish in his performance, and might not improbably occasion serious mischief. And be it remembered, that, though from habit we come to admire symmetry and logical order, for the sake of those qualities themselves, and to feel disgust at the want of them, yet the original, and the efficient, reason for our seeking to adorn our performances with them, is, that they best insure the intentions of our clients being exactly effectuated; for it is the habit of order and logical arrangement which can alone insure precision of effect.

The fourth general rule which we propose to lay Rule the fourth —that the ordi-

nary forms and technical language should be used.

down for the framing of legal instruments, is one which is universally admitted, and will require but little explanation. It is, that the ordinary and accustomed forms of instruments and technical language should be employed. With respect to the use of the accustomed forms, it will be sufficient to refer to Blackstone, (2 Comm. 298): "It is not," says the learned commentator, "absolutely necessary, in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare, clearly and legally, the party's meaning. But as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity." We do not recommend a bigoted adherence to forms; but simply, that the employment of them should be the general rule,—the departure from them the exception, to be authorized only upon "good reason or urgent necessity."

Importance of a familiarity with technical language.

It is obviously essential that we should have a perfect familiarity with the meaning of the technical language of the law, and a thorough facility of handling as well the technical as the more ordinary but peculiar language which draftsmen employ. If we are not possessed of this facility and this intimate acquaintance with the phraseology of our profession, we are continually embarrassed and diverted from the object of our drafts, by the difficulty we have of expressing ourselves distinctly; and, however inge-

nious we may be in getting over our difficulties, our performances must always appear crude and informal. The possession of brilliant talents is not necessary for the acquisition of the qualities adverted to; they are attainable by the exercise of common attention, aided by an ordinary memory. The mode of attaining them is simply practice: the student must peruse and copy the drafts of able masters; must diligently study printed or written precedents of well-drawn instruments, and must learn the art of drawing drafts under the inspection, and subject to the revision, of skilful practitioners.

Rule the fifth—that the language should be precise and accurate.

The importance of the use of technical language and of legal phraseology is universally admitted; no man, in fact, can be termed a draftsman, who is not perfectly versed in it. But there is another rule respecting the language of drafts, which is of hardly less consequence, but which seems to be very little understood. It follows directly from the leading principle previously stated; for, as the object of legal instruments is to preserve testimony clearly and distinctly, it is of the highest importance that legal language should be, to the utmost possible extent, precise and accurate: that is, that every phrase should have a clear meaning, and that the connexion of all, together, should be so made as to give rise to no ambiguity. It is very true, that every person who has ever thought of the point, whether a lawyer or not, will at once admit the propriety of the rule, and will be very likely to allege, that it is a mere assertion of a truism: but yet, to one who has paid attention to the subject, and has been in the

habit of perusing drafts in the ordinary course of business, nothing can be more obvious, than that, notwithstanding the necessity of precision and accuracy will be so readily allowed, the great majority of the persons who prepare drafts, do not understand the means of attaining those qualities, and do not appreciate them when they see them in the drafts of others. We do not doubt that most men aim to be accurate. There is abundance of this would-be accuracy in the addition of descriptions, to distinguish persons and things which need no distinction, and in the expression of matters which it is of no use to express; but the real and effectual accuracy and precision which are attained by the use of apt words and the omission of superfluous phrases, by correct references and a strict adherence to the rules of grammar, are qualities too frequently wanting. For example, a draft may be met with, in which a previously recited instrument is always thus referred to: "the said hereinbefore in part recited indenture of assignment, of the —— day of ——;" when, there having been no other instrument of the same date mentioned, the proper and sufficient reference would be, "the said indenture of the —— day of ——;" but when we come to the habendum of this same draft, (supposing it to be the draft of a deed of conveyance of an undivided moiety), we find it expressed, "to hold the said undivided moiety of the said hereditaments hereinbefore released;" whereas, it being the moiety and not the hereditaments that were released, the habendum should, of course, be, "to hold the said undivided moiety here-

inbefore released, of the said hereditaments hereinbefore described." Again, in the recital of the parties to a deed, we may find the addition to each of the names of "therein particularly described," which conveys no additional information whatever, since every one knows, that a party to a deed is described in it. And when we proceed to the operative part of the instrument, in the recitals of which we have seen this affected accuracy, we meet with a declaration, that the trustees shall stand possessed "of the share in the trust-monies of the said A. B.," as if the monies and not the share belonged to A. B. Of course, it is obvious, that the expression should be, "of the share of the said A. B. in the said trust-monies" (*a*). Another absurd instance of ungrammatical arrangement occurred in a marriage settlement, which was lately before the editor, and which had been prepared in the office of a solicitor of fair consideration in the profession. It was a direction, that, on failure of children, the funds should be in trust "for such persons as would be entitled thereto, in case the said [*intended wife*] had died intestate and unmarried, according to the statute for the distribution of the personal estate of intestates." Of course, this would

(*a*) In a modern conveyancing work of considerable merit, there is a recommendation to the student, that, in reciting an indenture, he should avoid describing it as "made, *or expressed to be made* between" the parties. But this is a mistake; for as it constantly happens that all parties did not execute, and the draftsman can seldom tell what was the fact, it is more accurate to mention the indenture as expressed to be made, than simply as made, between all the parties.

be taken to mean what it was intended to express, namely, that the funds should be in trust for such persons as would have been entitled thereto according to the statute, in case the wife had died intestate and unmarried. But, according to the grammatical construction of the words, it would seem that the wife was to die according to the statute. The greatest part, however, of the inaccuracies and mistakes which abound in the productions of careless draftsmen, are either mere superfluities or such utter nonsense, as not to work any serious mischief. In most of them it is obvious what the intention of the parties must have been, however absurdly that intention may have been expressed. But, occasionally, instances of want of accuracy occur, which lead to the necessity of a judicial interpretation, and bewilder the court itself to conjecture the meaning of the language. Thus, in a recent case, (*Lucas* v. *Bond*, 2 Keen, 136), the subject of controversy was a deed, by which, after recitals, shewing that A. B. was entitled to a reversionary interest in a moiety of a sum of 2,000*l.*, part of a sum of 20,000*l.*, then invested in 3*l.* per cent. consols, A. B. assigned to C. D. "all that the said sum of 1,000*l.* sterling, being one moiety of the said legacy or sum of 2,000*l.*" Of course, a proportionate share of the consols did not, on a sale, produce exactly 1,000*l.*: there was, in fact, a surplus, and the suit was instituted for the purpose of determining, whether the vendor or the purchaser was entitled to that surplus.

No general rules can be laid down for the conduct of the draftsman, in his attempts to attain the ha-

bitual use of correct language. He must, of course, be well acquainted with the rules of English grammar, and the meanings of English words, and must pay attention to the expressions he uses; and he will here, also, derive the greatest benefit from the study of correctly drawn precedents, and from the habit of preparing drafts, under the superintendence and revision of skilful draftsmen: but, in general, he must, in great measure, be guided by his own tact and taste. Constant vigilance is essential: there is no habit which, when indulged in, or not strenuously resisted, more grows on the draftsman, than that of slurring over a difficulty of expression, with the reflection, that his meaning, though improperly expressed, cannot be mistaken. But this is a most dangerous and discreditable practice; for not only does it render his drafts hard to understand and disagreeable to peruse, but it puts him in imminent danger of thoughtlessly introducing inaccurate expressions, on occasions on which they may produce serious mischief. The observation which has been previously made, in reference to the arrangement, applies, with equal force, to the language of drafts; namely, that the *habit* of accuracy and precision is of the first consequence, and cannot be too eagerly sought after: no brilliancy of talent, no ingenuity can, in the ordinary detail of business, compensate for the want of this invaluable habit.

The manner in which the collection of precedents is intended to be used.

It only remains to explain the plan upon which the following collection of precedents has been formed, and to indicate in what manner, in the opinion of the editor, the forms may be most use-

fully employed. These volumes are not intended to present an immense variety of precedents, from which the draftsman may select one very nearly resembling each draft he has to draw. For such a purpose, a much larger space would be required than two or three octavo volumes afford; and therefore, the object of the editor, in accordance both with the plan originally projected by Mr. Martin, and with the editor's own views, has been to present a collection of models of drafts, sufficiently complete to enable any person who has studied it thoroughly, and is competently acquainted with the general rules of law and of framing legal instruments, to construct for himself those fresh forms which fresh combinations of events call for. Collections so large, that their owner is acquainted only with a small portion of the precedents, and refers to the rest from the Index, on the spur of the moment, are of little practical use. The draftsman has always recourse to those few with which he is acquainted, and leaves the rest untouched. The present Collection is intended not merely to be referred to when a precedent is wanted for business; but also as a series of forms, to be studied and impressed on the mind. The Precedents, with very few exceptions, have been taken from the drafts of a very small number of draftsmen, and those men all acting on the same principles, and habituated to the use of the same language and forms. Those differences, too, of form and language, which, to some extent, always exist in drafts prepared by different persons, have, as far as possible, been removed in the course of preparing the precedents for the press, so

as to make the language and arrangement of the whole collection as nearly uniform as may be, and to render any part of one precedent capable of being easily united with any other in the construction of a fresh draft.

Character of the notes.

The notes are designed to be chiefly of a practical character, not so much dealing with the points of law, which are discussed in a former part of the work, as tending to elucidate the forms and language of the precedents, and explain the duties of the draftsman. They are not to be considered elaborate or complete disquisitions on the points of law to which they refer, but simply as suggestions for the guidance of the draftsman, and references to the cases bearing on the draft in hand.

PRECEDENTS IN CONVEYANCING.

CONDITIONS OF SALE.

CONDITIONS OF SALE.

THE title "Conditions of Sale" does not appear in the original prospectus of the work; but as it is a frequent duty, both of counsel and solicitors, to prepare such documents, it seems desirable to present the reader with some precedents of them. They are not, however, arranged exactly in the usual manner—that is, in the shape of copies of existing conditions, because several in each set are nearly always the same, and those which are special vary for each particular case. The plan pursued has been to give, first, the common conditions employed upon a sale, under ordinary circumstances, of a freehold or copyhold estate, with a perfect title, and then to add, under appropriate heads, the precedents of conditions adapted to various special circumstances, and to peculiar kinds of property. A person who wishes to avail himself of this collection, should make himself generally acquainted with the forms, and with the suggestions contained in the notes; so that when he is called on to frame a set of conditions for actual practice, he may have little hesitation in selecting such forms as will meet the circumstances for which he is to provide: for it should be borne in mind, that conditions of sale, as well as more formal instruments, ought never to be framed by copying at random from any precedent, or any previously existing set of conditions, but that they ought to be carefully adapted to the nature and the title of the property which is to be sold.

The arrangement and plan of the precedents.

There is no task which a conveyancer has to execute, of greater responsibility and risk than that of framing conditions of sale; because it is, in fact, an undertaking to defend the title against the objections of all the world. It is necessary to foresee every possible objection, and to guard, by special conditions, against all which cannot be removed, and, at the same time, not to insert a single unnecessary stipulation; because, every stipulation beyond those ordinarily used, is calculated to alarm purchasers. It is undoubtedly

Difficulty of framing conditions of sale.

Impropriety of

the habitual use of special stipulations as to title.

true, that those conditions now so commonly employed, which preclude the purchaser from requiring the usual evidence of title, save the vendor some expense, and the vendor's solicitor some trouble: but still, it is clear that no prudent person, who understands their effect, will purchase, subject to them. And admitting, that the great majority of purchasers do not understand their effect, yet, when we consider that if, by the use of such stipulations, we deter a single person from bidding, in all probability we sensibly lessen the price we should otherwise obtain; and that all those purchasers (trustees especially) who, before bidding, consult their legal advisers, and all members of the legal profession (who are sufficiently numerous) would be deterred from bidding under such stipulations as preclude them from requiring a fair title, we may well doubt, whether the consequences to the vendor of selling, subject to such conditions, are not quite as pernicious as those of selling without appropriate and necessary conditions. Such, however, is not the view, at present, generally taken; for it seems to be imagined, that no conditions, however extravagant, will prejudice a sale. But, at all events, it must be understood, that conditions of sale must be clear and intelligible to a man of ordinary understanding: they must *clearly tell the purchaser what he is not to require*, and must not be of such a nature as to mislead or deceive him. If they are of doubtful meaning, they will, of course, be always construed against the vendor, by whom they have been framed. See *Dykes* v. *Blake*, 4 Bing. N. C. 463.

Conditions must not be so worded as to mislead purchasers.

Remarks on the language of the precedents.

Most of the following conditions are framed for a sale in lots, but they may easily be adapted to the case of the sale of an estate in one lot, by omitting the words referring to the division of the property, and the plurality of purchasers, and by other trifling alterations.

Conditions of sale generally attempt to distinguish between male and female purchasers, by the use of both masculine and feminine pronouns, when speaking of the purchasers; but they always seem to consider each person as an individual, and do not attempt to provide for the case of joint purchasers. In the following precedents, it has been deemed best, for the sake of simplicity, always to speak of the purchaser in the masculine gender and the singular number. There can be no doubt that, whenever necessary, conditions so framed would be held to be as binding on female or joint purchasers as on a single male purchaser. With respect to the vendors the case is different; because, as it is known beforehand who they are, the language of the conditions may and should be suited to their circumstances and number. The requisite alterations in the forms may be easily made.

COMMON CONDITIONS *of* SALE *of* FREEHOLD *or* COPYHOLD ESTATE.

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

I. THAT each lot shall be put up at the sum fixed by the auctioneer; the highest bidder shall be the purchaser; and if any dispute shall arise as to the last or highest bidder for any lot, the same shall be put up again at a former bidding (*a*).

II. That no person shall, at any bidding, advance less than ——£ for lots ——; less than £—— for lots ——; or less than £—— for lots ——; or retract his bidding (*b*).

(*a*) It is doubtful whether the employment, on the part of the vendor, of even a single puffer, unless with public notice of the intention, does not vitiate the sale (1 Sugd. V. & P. 23—30); and, therefore, unless the sale is to be made without reserve, it may be deemed right to subjoin to this condition a notice that

"one person will bid at the sale on behalf of the vendor."

In practice, however, this is seldom attended to. In case it be deemed advisable (1 Sugd. V. & P. 29) to reserve only one bidding, the notice should be—

"one bidding will be reserved for each lot."

It has been decided, that in the case of a sale under the direction of a court of equity, the court will (if it see fit) authorize a reserved bidding. (*Jervoise* v. *Clarke*, 1 Jac. & Walk. 389).

As to biddings on behalf of the vendor.

(*b*) Every bidding at a sale by auction, is nothing more than an offer by the purchaser, and is not binding, on either side, till it is assented to by the vendor; for otherwise, one party would be bound and the other not, which the law does not allow. *Routledge* v. *Grant*, 4 Bing. 653; 1 Moo. & Pay. 717. The assent of the vendor is signified by the fall of the hammer of the auctioneer; and hence a bidding, at a sale by auction, may be retracted at any time before the fall of the hammer. *Payne* v. *Cave*, 3 T. R. 148. To prevent this inconvenience, it is now always stipulated, that no purchaser shall retract his bidding. But it is not very clear, that the purchaser of an interest in land can be bound until his

As to retracting biddings.

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

III. That every purchaser shall, immediately after the sale, pay a deposit (*c*), in the proportion of £—— for every hundred of his purchase-money, into the hands of the auctioneer, and sign an agreement (*d*) for payment of the remainder, on the (*e*) —— day of —— next, at the office of Mr. A. B., [*the vendor's solicitor*], at which time and place the purchases are to be completed, and the purchasers to have the actual possession (*f*) of the respective lots purchased by them: all outgoings, up to that time, will be discharged by the vendor (*g*).

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name is written down by the auctioneer or clerk. (See *Malins* v. *Freeman*, 2 Keene, 25). This case, however, only decides, that if a lot is purchased by mistake, a court of equity will not enforce a specific performance, but will leave the vendor to his remedy at law.

Purchase by mistake.

As to deposits.

(*c*) The deposit is not merely a pledge, but is a part payment of the purchase-money. The auctioneer is deemed a stakeholder of it, and can, if need be, compel the parties to settle their rights to it by interpleader. If the purchase be completed, it belongs to the vendor; and if abandoned, to the purchaser. If the contract be rescinded, the purchaser may recover, from the vendor, interest on the deposit; and if the *vendor's* bill, for a specific performance, be dismissed, the re-payment of the deposit, with interest, will be ordered by the court dismissing the bill. *Lord Anson* v. *Hodges*, 5 Sim. 227. See the cases on the subject of deposits collected and commented on, 1 Sugd. V. & P. 47—51; and see, also, *Williams* v. *Edwards*, 2 Sim. 78; *Berry* v. *Armistead*, 2 Keen, 221. As to recovering interest on deposits, see 2 Sugd. V. & P. 13—18.

(*d*) See the precedent of such an agreement, *infra*, page 36.

Of the day for completion.

(*e*) Such a day should be named as will allow a fair interval for investigating the title and preparing the conveyance. A quarter-day is usually fixed, because rents and outgoings can be thus more easily apportioned.

As to an estate in tenancy.

(*f*) This condition is framed with a view to an estate in hand: if it be in the occupation of a tenant, instead of "have the actual possession," substitute—

"be let into the receipt of the rents and profits;"

and after the word "outgoings," insert—

"payable by the landlord."

Interest on purchase-money.

(*g*) It constantly happens, that, from too early a day being named for the completion of the purchase, or from the careless and insufficient manner in which the vendor's title is made out, before the sale, or from

IV. That within (*h*) —— days from the day of the sale, the vendor shall, at his own expense, make and deliver to every purchaser, or his solicitor, an abstract of the title of the vendor to the lot or lots purchased by him respectively (*i*).

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

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other incidental circumstances, the purchase is not completed on the day named in the conditions. In that case, the general rule is, that the purchaser must pay interest on the unpaid part of his purchase-money, and take the rents and profits of the estate from the day on which the purchase ought to have been completed. (2 Sugd. V. & P. ch. x. sect. 1).

But this rule does not hold good if the delay of completion has been owing to the vendor, and either the purchase-money has been kept in hand without producing interest, and with notice of that fact given to the vendor, or the interest exceeds the amount of rents and profits. (Sugd. V. & P. *ubi supra*).

These exceptions lead to so many disputes and to such vexatious inquiries, (see *Winter* v. *Blades*, 2 Sim. & Stu. 395), that it has become an almost universal practice to stipulate, that if, from any cause whatever, the purchase shall not be completed on the day named, the purchaser shall pay interest, and take the rents and profits. See *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 122; and see the form of such a condition, *infra*, page 39. In case it be used in the present conditions, it will take the place of the words following the word "completed."

Vendor's liability.

It is to be observed, that if the delay arise from the state of the title, or any other default of the vendor, and he be receiving interest, he will be chargeable as a trustee, not only with the rents he actually receives, but also with those which, without his own wilful default, he might have received; (*Wilson* v. *Clapham*, 1 Jac. & Walk. 36; *Acland* v. *Gaisford*, 2 Man. 28); and also with any damage which the estate may have sustained in the interim by his improper management. (2 Sugd. V. & P. 23).

Delivery of abstract.

(*h*) The abstracts ought to be prepared prior to the sale, so that nothing may remain to be done subsequently, beyond making copies proportioned to the number of purchasers. If the vendor fail to deliver his abstract within, or at, the time appointed, any conditions binding the purchaser to make his objections within a specified time from the delivery of the abstract, fails of effect. (*Southby* v. *Hutt*, 2 My. & Cra. 207, 211. See, too, *infra*, *Conditions as to Time*, page 42).

(*i*) It is very usual to add—

"and shall deduce a good title thereto:" *or*, "and shall deduce a good title thereto, subject to these conditions:"

but the expressions are superfluous; for every vendor is, by the mere contract to sell, bound to deduce a good title, and that obligation is qualified by the conditions of sale, (if there be any), without the aid of an express stipulation. (1 Sugd. V. & P. 331; *ante*, Vol. 1, pp. 83, 84).

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

V. That upon payment of the remainder of the purchase-money, at the time and place above mentioned, the vendor shall execute proper conveyances to the respective purchasers of the several lots purchased by them respectively; but such conveyances are to be prepared by and at the expense of the respective purchasers, and are to be tendered or left by them, on the said —— day of ——, at the office aforesaid, for execution by the vendor (*k*).

VI. That if any mistake be made in the description of the property, or any other error whatever shall appear in the particulars of sale, such mistake or error (if capable of

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Conditions for copyholds.

(*k*) The language of the fifth condition applies to freehold property. If the property be copyhold, the following condition may be employed instead of that in the text:—

"That upon payment of the remainder of the purchase-money at the time and place above mentioned, the vendor shall execute proper deeds of covenant for surrender, to the respective purchasers of the several lots purchased by them respectively; but such deeds are to be prepared by and at the expense of the respective purchasers, and are to be tendered or left by them, on the said —— day of ——, at the office aforesaid, for execution by the vendor."

See another form of condition in the next page.

Whether an agreement to convey implies an obligation to covenant for title.

It does not seem necessary to stipulate that the vendor will surrender, as that will be a consequence of the covenant; or that he will execute proper covenants for the title, since that may be as well implied as in the case of the conveyances of the freehold. And in practice, certainly, conditions of sale never do any thing more than stipulate that the vendor shall execute proper conveyances, although it has been held, that a person who is bound to make a conveyance, is not thereby bound to covenant for title. (*Coles* v. *Kinder*, Cro. Jac. 571; *Hanroyde* v. *Lococke*, Cro. Jac. 115; Comyn's Dig. Condition (H), *Conditions to make assurance*; 1 Russ. 252, 256. Probably, however, at the present day, the foregoing cases would be held to be overruled by the practice of conveyancers; for, when the vendor has agreed to execute a proper conveyance, conveyancers invariably insert covenants for title, unless the vendor is a trustee, or other person who does not usually enter into such covenants: and it has even been maintained, that, unless the purchaser can have the usual covenants for title, he is not bound to complete. The editor has not made any deviation from the usual form of the condition; because, there is no occasion to make an additional stipulation for the vendor to fulfil, the

compensation) shall not annul the sale, but a compensation (*l*) shall be allowed or given by the vendor or pur-

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

absence of which will not, in the slightest degree, prejudice the sale. The alteration can, however, be easily made by any vendor who may approve of it.

Another form of condition for copyholds.

In the following condition for the sale of copyholds, a stipulation as to covenants for title has been introduced within brackets:—

"That as soon after payment of the remainder of the purchase-money, at the time and place above mentioned, as circumstances will admit, the vendor shall, at the expense of the respective purchasers, make proper surrenders to them of the several lots purchased by them respectively; [and shall also enter into proper covenants for title with the respective purchasers: but the deeds containing such covenants are to be prepared by and at the expense of the respective purchasers, and to be left by them, on the said —— day of ——, at the office aforesaid, for execution by the vendor, after the said surrenders shall have been made"].

If the property be freehold and copyhold.

If the property sold be partly freehold and partly copyhold, a condition may be framed from the condition in the text and one of the two preceding, so as to suit the circumstances; but it is better to have two distinct conditions—one as to the conveyance of the freehold, and the other as to that of the copyhold property.

General rule as to preparing the conveyance.

It is to be observed, that, independent of stipulation, a purchaser is bound, at his own expense, to prepare and tender a conveyance; (1 Sugd. V. & P. 246, 247, 450; *Price* v. *Williams*, 1 Mee. & Wels. 6); and, if the property be copyhold, the purchaser must bear the expense both of surrender and admission. (1 Sugd. V. & P. 450). It is, however, the invariable custom to make a special condition on the subject. As to the necessity of preparing and tendering a conveyance, when the vendor fails to make out a good title, see 1 Sugd. V. & P. 248; *Rippinghall* v. *Lloyd*, 5 B. & Ad. 742.

Compensation.

(*l*) It is a well-settled rule, that, when circumstances will not permit of the entire performance of a contract, a court of equity will not, in ordinary cases, and in the absence of stipulation, compel the performance, in part, of the contract, with an indemnity or compensation for the part that cannot be performed. (*Ante*, Vol. 1, p. 94; 1 Sugd. V. & P. ch. vi.) Hence a condition, similar to the above, is employed on every sale by auction, and frequently on sales by private contract; and it then becomes

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

chaser, as the case may require, such compensation to be settled by two referees or their umpire, in manner follow-

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a matter for the consideration of the court, in each particular case, whether the mistake or error is such as to be capable of compensation. It is clear, that, notwithstanding a condition of the above nature, if the description given of the premises in the particular be intentionally false or exaggerated, the purchaser is entitled to rescind the contract altogether; (*Dykes* v. *Blake*, 4 Bing. N. C. 463; *Robinson* v. *Musgrove*, 2 Moo. & Rob. 92); but not so, perhaps, if the mistake be unintentional, although of such a nature as to mislead a purchaser. (*Wright* v. *Wilson*, 1 Moo. & Rob. 207). The general principles of the law on this subject are thus laid down by Tindal, C. J., in the case of *Flight* v. *Booth*, 1 Bing. N. C. 370:—"It is extremely difficult to lay down, from the decided cases, any certain definite rule, which shall determine what mistatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this—that where the mistatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to mistatements which stand clear of fraud, *it is impossible to reconcile all the cases;* some of them laying it down, that no mistatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; (*Duke of Norfolk* v. *Worthy*, 1 Camp. 340; *Wright* v. *Wilson*, *ubi supra*); whilst other cases lay down the rule, that a misdescription, in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. (*Jones* v. *Edney*, 3 Camp. 284; *Waring* v. *Hoggart*, 1 Ry. & Moo. 39; *Stewart* v. *Alliston*, 1 Mer. 26). In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract, that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

Vendor's claim to compensation.

The condition is always so worded, as to allow the vendor to obtain compensation, if he has sold what he did not intend to sell: but this right is very seldom exercised. It must, indeed, be a very strong case of mistake for a vendor (who has full means of ascertaining, with the utmost accuracy, what he intends to sell,) to succeed in obtaining compensation, or, in other words, an increase of his purchase-money, for an alleged mistake he has himself made.

ing: (that is to say), each party shall, within fourteen days after notice of the mistake or error shall have been given, appoint one referee, by writing, and the referees so appointed shall, before they commence their duty, appoint an umpire, by writing; and the decision of such referees, if they agree, or of such umpire, if they disagree, shall be final. In case either party shall neglect or refuse to appoint a referee within the time specified, the referee appointed by the other party shall make a final decision alone.

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

VII. That if any purchaser shall neglect or fail to comply with the above conditions, his deposit shall be thereupon actually forfeited to the vendor (*l*), who shall be at

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Sometimes, instead of the condition in the text, the following form is used:—

Variation in the form of the condition.

"The description of the property in the particulars of sale is taken from a recent survey, and is considered, and shall be taken to be, correct; and if any error or mistake shall appear in the particulars, the sale shall not be thereby annulled, nor shall any compensation be allowed or given in respect thereof, unless the same shall relate to the amount of rents or incumbrances, in which case a compensation shall be allowed or given, &c." [*Proceed as in the text*].

However, such a condition is not unlikely to throw a suspicion on the sale, which would not be occasioned if the form in the text—the usual form, were adhered to.

(*l*) It seems, that a court of equity will relieve against the forfeiture of the deposit, and allow it to be set off against the deficiency which may arise on a second sale, at least, when the purchaser has become bankrupt. (*Ex parte Hunter*, 6 Ves. 94; see *Ex parte Bridger*, 1 Dea. 581). It will, however, be right to retain the usual provision, till it has been decided that equity will, in all cases, relieve against the forfeiture of the deposit.

Forfeiture of deposit.

Even in the absence of express stipulation, the vendor having a lien for his purchase-money on the estate, will, if the purchaser make default, be entitled to have it re-sold, and to recover the deficiency (if any) from the purchaser, or prove it as a debt upon his estate, if he shall have become bankrupt. (*Bowles* v. *Rogers*, 6 Ves. 95, n. (a); Cooke's B. L. 146; *Ex parte Lord Seaforth*, 19 Ves. 235; 1 Rose, 106; *Ex parte Gyde*, 1 Glyn. & Jam. 323; *Hope* v. *Booth*, 1 B. & Ad. 498). But the common condition on the subject should always be retained; because,

Re-sale on default.

CONDITIONS OF SALE OF FREEHOLDS OR COPYHOLDS.

full liberty to resell the lots purchased by such person, and either by public auction or private contract, at such time and place, subject to such conditions and in such manner as the vendor shall think fit; and the deficiency in price (if any) which shall happen on such second sale, and all expenses attending the same, shall, immediately after the same, be made good and paid to the vendor by the defaulter at this present sale; and in case of non-payment, the whole, or such part of the same as shall not be paid, shall be recoverable by the vendor as and for liquidated damages (*m*).

AGREEMENT FOR PURCHASE.

AGREEMENT *for* PURCHASE *at an* AUCTION, *to be written at the foot of, or indorsed on, the Particulars of Sale* (*a*).

BE it remembered, that, at the sale by auction this —— day of ——, of the property mentioned in the above

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otherwise, a re-sale could only be made by the aid of a court of equity or bankruptcy, and the vendor could not, perhaps, recover the expenses attending the second sale, at least, when the first purchaser has become bankrupt. If a purchaser becomes bankrupt, his assignees may elect, either to fulfil or to abandon the purchase; (6 Geo. 4, c. 16, s. 76, and cases above cited); but, of course, they are bound by the condition as to re-sale, as much as the purchaser himself.

(*m*) There are usually added to this condition the words—

"and it shall not be necessary, previously, to tender a conveyance to the purchaser."

But, as it is perfectly well settled, that, in the absence of any stipulation to the contrary, the purchaser, and not the vendor, is bound to tender the conveyance; (*ante, Condition* 5, n. (*k*)); and as, moreover, the fifth condition expressly provides, that the purchaser shall tender the conveyance, the above words are superfluous, and should be omitted.

Agreement for the sale.

(*a*) Sir E. Sugden (2 V. & P. 315), recommends, that two sets of conditions should be prepared, at the end of one of which might be printed an agreement, for the auctioneer or agent of the vendor to sign; and, at the end of the other, an agreement for the purchaser to sign. This, how-

AGREEMENT FOR PURCHASE.

[within] written particular, C. D., of &c. [*the purchaser*], was the highest bidder for, and was declared the purchaser, subject to the above [within] written conditions of the property comprised in lot ——, at the price of £——; and that the said C. D. has paid into the hands of the above [within] named A. B. [*the auctioneer*] the sum of £——, by way of deposit and in part payment of his said purchase-money, and hereby agrees to pay to the vendor, at the above [within] named office of ——, on the above [within] named —— day of —— next, the sum of £——, being the remainder of the said purchase-money. As witness our hands.

A. B. for vendor.
C. D.

Purchase-money	£——	—	—
Deposit	£——	—	—
Remainder to be paid . .	£——	—	—

ever, is rarely attended to in practice, and seems to be unnecessary, since the whole terms of the contract may very well be comprised in one agreement, which both parties may sign. If the property be sold in very numerous lots, the forms of agreement may be printed on the particulars; but, in other cases, it will be less expensive to have written as many forms of the agreement as may be needed. A form of agreement is given in the text; and also a form to meet the common case of the property, or some part of it, not being sold at the auction, and being subsequently sold by private contract, subject to the conditions of sale. The agreements should, in all cases, be made and signed in the names of the principals, although to be executed by the agents; for, otherwise, the agents will be personally bound. (1 Sugd. V. & P. 53, and cases there cited). The words within brackets, in the agreements in the text, apply to the case of the agreements being indorsed on the particulars.

AGREEMENT FOR PURCHASE.

AGREEMENT *for the* SALE, *by* PRIVATE CONTRACT, *of a Lot which was not sold at the Auction, the Sale being subject to the same Conditions.*

BE it remembered, that E. F., of &c., [*the vendor*], hereby agrees to sell, and C. D., of &c., [*the purchaser*], to purchase the property comprised in lot ——, of the above [within] written particular, at the price of £——, subject to the above [within] written conditions, so far as the same are applicable to a sale by private contract; and that the said C. D. has paid into the hands of the said E. F., [*or*, of A. B., as agent for the said E. F.] the sum of £——, by way of deposit and in part payment of his said purchase-money, and hereby agrees to pay to the said E. F., at the above [within] named office of ——, on the —— day of —— next, the sum of £——, being the remainder of the said purchase-money. As witness our hands, this —— day of ——.

E. F.
C. D.

Purchase-money	£——	—	—
Deposit	£——	—	—
Remainder to be paid . .	£——	—	—

CONDITIONS AS TO AUCTION DUTY, INTEREST, &c..

CONDITIONS *of* SALE *as to* AUCTION DUTY, INTEREST, INVESTMENT *of* DEPOSITS, FIXTURES, TIMBER, *and* CROPS.

I. THAT the auction duty (*a*) of seven-pence in the pound on the purchase-money shall, immediately after the

Auction duty.

(*a*) A duty of seven-pence in the pound on the purchase-money is payable on sales by auction of any freehold, copyhold, or leasehold here-

sale, be paid to the auctioneer by the purchaser [and vendor in equal moieties].

CONDITIONS AS TO AUCTION DUTY, INTEREST, &c.

II. That if, from any cause whatever, any purchase shall not be completed on the said —— day of ——, the purchaser shall pay interest on the remainder of his purchase-money, [and on the amount of the valuation mentioned in the —— and —— conditions], after the rate of £—— per cent. per annum, from that day until the purchase shall be completed, and shall from the same day be entitled to the rents and profits of the lot or lots purchased by him; all out-goings payable by the landlord up to the said —— day of ——, will be discharged by the vendor (*b*).

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ditaments. The auctioneer is bound to pay the duty and may deduct it from the purchase-money he receives, or recover it from the vendor. (1 Sugd. V. & P. 13, 18). But the vendor is at liberty to stipulate that the whole or any part of the duty shall be paid by the purchaser; and if such stipulation be made, and the purchaser refuse to pay the duty when demanded by the auctioneer, the statute declares his bidding to be altogether void. (1 Sugd. V. & P. 44). But it has been decided that the bidding is made void only at the option of the vendor, and that the statute does not enable a purchaser to rescind the contract by making default in payment of the duty. (*Malins* v. *Freeman*, 4 Bing. N. C. 395). The duty attaches only on the money actually payable to the vendor, and not on such part of the consideration as may be retained by the purchaser to meet incumbrances. (*Rex* v. *Sedgwick*, 2 Cro. Mee. & Ros. 603). If the vendor fail in making out his title, no auction duty is payable by the purchaser; (*Jones* v. *Nanney*, 13 Price, 76; M'Cleland, 25); and he may recover any that he has paid. (*Cane* v. *Baldwin*, 1 Stark. 65; *Berry* v. *Armistead*, 2 Keen, 227).

Sales made under a decree of a court of equity, or by a sheriff, or the assignees of a bankrupt, or for redemption of the land-tax, and for some other purposes, are exempt from auction duty. (1 Sugd. V. & P. 13). And if the estate of a bankrupt be in mortgage, and be sold by order of his assignees without the concurrence of the mortgagee, no duty is payable; but if the mortgagee concurs in the sale, or makes a sale himself under Lord Roslyn's order, whether or not the duty is payable, is a point at present undetermined. (1 Sugd. V. & P. 14, *et seq.*)

(*b*) See *ante*, page 30, note (*g*). The condition in the text applies to a property in tenancy; if the estate be in hand, the condition should be, that, from the same day, the purchaser shall be entitled to the possession, and the words "by the landlord" should be omitted. It is sometimes stipulated, when the estate is in hand, that the purchaser shall, from the day

Interest.

CONDITIONS AS TO AUCTION DUTY, INTEREST, &c.

III. That within seven days after each deposit shall be paid, Mr. A. B., [*the auctioneer*], shall lay out the remainder (after deducting his commission) of the same in the purchase of exchequer bills; and such exchequer bills, if paid off, shall be replaced by other like bills; and the said exchequer bills shall be deposited at the banking-house of the said Mr. A. B., until the purchase shall be completed or abandoned. And if any purchaser cannot be compelled to complete his purchase, and shall be enabled at law to recover his deposit, the exchequer bills in which such deposit, after deducting the auctioneer's commission as aforesaid, shall then be invested, together with the interest, (if any), which may have been received or become due for or upon the same bills, or for or upon the bills in lieu of which the same may have been taken or purchased, and together with the amount of the said commission of the auctioneer, shall be accepted by the purchaser in full satisfaction of all claims for his deposit and the interest thereon, and all expenses of investigating the title or otherwise (*c*).

IV. That each purchaser shall take all tenant's fixtures (*d*) belonging to his lot or lots, and pay for the same

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fixed for completion, be entitled

" to receive from the vendor an occupation rent for the lot or lots purchased by him, the amount of such rent, and all questions relative thereto, to be settled by two referees or their umpire, such refeeees and umpire to be appointed in the same manner, and to have the same powers as the referees and umpire mentioned in the —— condition."

Investment of deposit.

(*c*) This condition is extremely unusual, and is only adapted to purchases of large amount. Its object is, to free the vendor from the loss of interest, and from loss by depreciation in the investment of the deposits. The form in the text does not provide for the destination of the exchequer bills, in case the purchase be completed, but assumes that the vendor is to accept them as the deposit. Exchequer bills form the best fund for investment, because they are liable only to trifling fluctuations in value; but the condition (if need be), can readily be adapted to providing for investment in other securities.

Fixtures.

(*d*) The condition in the text is confined to tenant's fixtures; but the

CONDITIONS AS TO AUCTION DUTY, INTEREST, &c.

at the time of completing his purchase, according to a valuation thereof to be made on or before the said (*t*) —— day of ——; and the decision as to what are tenant's fixtures, and the valuation thereof, shall be made by two valuers or their umpire, such valuers and umpire to be appointed as soon as conveniently may be after the sale, in the same manner and to have the same powers as the referees and umpire mentioned in the —— condition.

V. That each purchaser shall, at the time of completing his purchase, pay for all timber and timber-like trees, [fruit trees], pollards, and saplings, down to the value of 1*s.* per stick, according to a valuation thereof, to be made on or before the said (*e*) —— day of ——, by two surveyors or their umpire, such surveyors and umpire to be appointed as soon as conveniently may be after the sale, in the same manner and to have the same powers as the referees and umpire mentioned in the —— condition.

VI. That each purchaser shall take the straw, manure, fallows, crops, tenant's fixtures, and other things left on his lot or lots by the outgoing tenants, to whom the same shall respectively belong, and pay for the same at the time of completing his purchase, according to a valuation, and the valuation, and the decision as to what are tenant's fixtures, and as to any other disputed point relative thereto, shall be made by two valuers or their umpire, such valuers and umpire to be appointed in the same manner, (save that one of the valuers shall be appointed by the outgoing tenant

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same form is readily applicable to trade fixtures, or any other class of fixtures, or to all fixtures of every description. If it be intended that the fixtures shall be paid for by the purchaser, a condition of this sort should always be employed; for, otherwise, they would probably be held to go with the freehold, and to be included in the contract for the sale of the property to which they are attached. (*Colegrave* v. *Dios Santos*, 2 B. & C. 76; S. C. 3 Dow. & Ryl. 255; see, however, Lord Hardwicke's dictum to the contrary, *Ex parte Quincy*, 1 Atk. 477).

(*e*) The day fixed for completing the purchase. In case this condition, or either of those relating to timber or crops, be used, the condition as to interest should extend to the amount of the valuations. See the words included in brackets in that condition, and the precedent of condition for a sale under a decree of the Court of Chancery, *infra*.

CONDITIONS AS TO AUCTION DUTY, INTEREST, &c.

instead of the vendor), and to have the same powers as the referees and umpire mentioned in the —— condition.

VII. That the expense of any valuation, survey, reference, arbitration, or decision, to be made under any of the present conditions, shall be borne and paid by the purchaser to whose purchase the same shall relate, and the vendor or outgoing tenant as the case may be, in equal moieties (*f*).

CONDITIONS AS TO TIME.

CONDITIONS *as to* TIME.

I. THAT every purchaser shall make his objections and requisitions, (if any), in respect of the title to the lot or lots purchased by him, and send the same to the said office of the said Mr. A. B., [*vendor's solicitor*], within —— from the day of the delivery of his abstract; and all objections or requisitions which shall not be made within the time specified, shall be taken to be waived (*a*).

(*f*) A stipulation to this effect is not very common, and, probably, contains nothing more than the law would enforce in its absence; but if employed, it will prevent disputes on the subject to which it relates.

Limited time for purchaser's requisitions.

(*a*) A condition of this nature is very generally used, and has a very beneficial effect in producing expedition on the part of the purchaser; but the time specified should be a reasonable time, proportioned to the length and difficulty of the title; for, otherwise, very slight circumstances would induce a court of equity to relieve the purchaser. If a time be specified for the delivery of the abstract, and the abstract be not delivered within that time, the vendor will lose the benefit of the present condition. (*Southby* v. *Hutt*, 2 My. & Cra. 207, 211). Of course, the abstract delivered must be a complete abstract of all the muniments of title, and must shew, that, upon certain acts done by the vendor or persons whom he can control, the legal and equitable estates will be vested in the purchaser. (*Lewin* v. *Guest*, 1 Russ. 325; 8 Ves. 436; 1 Jac. & Walk. 421).

Although a purchaser may fail to make his requisitions and objections within the time allowed, yet, if the vendor receive them after that time, and permit the investigation of title to go on, he will be taken to have waived the advantage of the condition.

It is sometimes stipulated that the purchaser's requisitions shall be

II. That if, from any cause whatever, any purchase shall not be completed on or before the said —— day of —— (*b*), the vendor shall be then at liberty either to annul or to enforce the contract for such purchase at his discretion; and in case he shall annul the contract for such purchase, the deposit paid in respect of the same shall be forfeited to the vendor, and the purchaser shall have no claim on the vendor for the expenses of investigating the title or otherwise.

CONDITIONS AS TO TIME.

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made within a given time from the delivery of the abstract; that the vendor's answer shall be made within a given time from the delivery of the requisitions; the purchaser's further requisitions within another given time; the vendor's further answer within a further given time; the draft of the conveyance sent to the solicitor of the vendor, and returned to that of the purchaser within certain specified times; and the purchase finally completed on a given day. But such special stipulations can scarcely ever, in practice, be fully carried into effect; and their object is attained almost as well by stipulating, that if the purchase be not completed by the day fixed, the purchaser shall pay interest on his purchase-money, and by binding him to send in his requisitions and objections within a given time from the delivery of the abstract. If the abstract be (as it always ought to be) complete when sent to the purchaser, so as to leave him no ground for making further requisitions on new evidence to be subsequently furnished, the stipulations in the text will insure the exertion of fair expedition on the part of the purchaser, and the complicated stipulations referred to above could do no more. 'Delay in the completion of the purchase more generally arises from the insufficiency of the abstract and evidence furnished by the vendor, (and which he is, nevertheless, ultimately obliged to complete and supply), than from any laches on the part of the purchaser.

Time may be made the essence of the contract.

(*b*) It is now perfectly clear that time may be made the essence of the contract, even in equity; (1 Sugd.V. & P. 440; *Hipwell* v. *Knight*, 1 You. & Col. 401); but the intention must be clearly expressed, because the general rule in equity is, that the time fixed for the completion of the purchase is merely formal. (See Sugd. V. & P. ch. 8, and ante, Vol. 1, book iii. ch. i.) It must be borne in mind, likewise, that the benefit of a stipulation making time the essence of the contract may, like the benefit of any other condition, be waived by the party entitled to it; (*Hipwell* v. *Knight*, *ubi supra*); and, of course, a vendor would not be permitted to avail himself of the condition in the text to annul a contract, the completion of which, his own laches had prevented. A condition of this sort is very unusual in sales by auction; and as it must most seriously prejudice the sale, it should never be had recourse to, except in cases of absolute necessity.

CONDITIONS AS TO TITLE DEEDS.

CONDITIONS *as to* TITLE DEEDS (*a*).

THAT the production and inspection of all deeds (*b*), evidences, and muniments of title, which are not in the

Custody of title deeds.

(*a*) The law respecting title deeds is partially treated of in the first volume of this work, (bk. i. ch. iii. sect. 2); and in Sugd. V. & P. ch. ix. sect. 3; but as the subject is very important to the conveyancer, it has been thought desirable to add some further observations on the right to the custody of the title deeds, and on other matters relating to them.

Between feoffee and cestui que use.

When a man seised of land in fee, made a feoffment in fee either without warranty or with warranty only against him and his heirs, the feoffee was entitled to the deeds and evidences of title, that therewith he might be enabled to defend the title; but if the feoffment were with general warranty, so that the feoffor would be bound to defend the title, then he was entitled to retain all deeds and evidences necessary for the maintenance of the title, and the feoffee could only claim such as related simply to the possession, (Co. Lit. 6. a.; *Lord Buckhurst's case*, 1 Rep. 1). Hence, on the introduction of conveyances to uses, with the usual qualified covenants, the question arose, whether the feoffee or releasee to uses, or the cestui que use was entitled to the deeds. All the old authorities are in favour of the feoffee and releasee; (Co. Lit. 6. a., n. 4; 1 Sand. Uses and Trusts, 119); but as a feoffee or releasee, having only a momentary seisin, cannot be called on to defend the title, it seems at the present day to be assumed, and may be asserted as the established law, that the cestui que use, or generally the person who for the time being is at law entitled to the land, for an estate in possession not less than freehold, has a right to the custody of the title deeds. (*Harrington* v. *Price*, 3 B. & Ad. 170; *Lord* v. *Wardle*, 3 Bing. N. C. 680; *Lightfoot* v. *Keane*, 1 Mee. & Wels. 745; *Phillips* v. *Robinson*, 4 Bing. 106; see, too, 1 Ves. sen. 394; 3 Ves. 225). A question may arise, however, whether a vendor who enters into unqualified covenants for title, would not, on the principles above stated, be entitled to retain the title deeds.

Recovery of title deeds by legal owner.

If the title deeds are not delivered up on the completion of the purchase, and the vendor afterwards deposits the deeds with a third person, as a security for money, the purchaser may sustain an action of trover against that person for the deeds, without paying the money due

(*b*) If the property be copyhold, insert here—
"copies of court rolls."

possession of the vendor, and the expense of all journeys (*c*) incidental to such production or inspection, and the pro- CONDITIONS AS TO TITLE DEEDS.

to him. (*Harrington* v. *Price, ubi supra; Hooper* v. *Ramsbottom*, 6 Taunt. 12). And, of course, the solicitor of a person who has no right to the deeds, has no lien on them for costs. (*Bell* v. *Taylor*, 8 Sim. 21; *Lightfoot* v. *Keane*, and *Phillips* v. *Robinson, ubi supra*). A mortgagee in fee is entitled to the deeds, and always ought to get them into his possession, (*see note on this subject, infra*); and, therefore, probably it is, that the usual decree in a foreclosure suit contains no directions with respect to the deeds. (1 You. & Jer. 121). It is presumed, however, that if the deeds were not in the possession of the mortgagee, the decree would order them to be delivered to him; at least, if the insertion of a direction to that effect were prayed by the bill. But, even if the mortgagee cannot, in the foreclosure suit, obtain the deeds, still, as legal owner of the land, he may recover them either before or after foreclosure. A mortgagee for a term of years, however, is not entitled to the custody of the deeds, either before or after foreclosure, for they belong to the freeholder; (*Wiseman* v. *Westland*, 1 You. & Jer. 117; *Harper* v. *Faulder*, 4 Madd. 129); and, therefore, in every mortgage for a term of years, the mortgagor should covenant to allow the mortgagee to retain the title deeds, as well before as after foreclosure.

Custom of granting deeds obsolete.

It was usual, formerly, to convey or assign the title deeds in all conveyances or assignments of the property to which they related. But this practice is now disused, for, since it has been established that the deeds belong to the legal owner of the land, any special grant of them to him is deemed needless. In the case (as of a mortgage for a term), where the deeds will not belong to the owner of the estate created, and it is intended that he shall have the custody of them, either the old form of granting them may be used, or a special covenant on the subject may be inserted in the deed. The latter method is the most convenient.

Leasehold title deeds.

As respects the title deeds of leasehold property, the law is the same as for those of freehold; the original lease, and all subsequent documents relating to the title, belong to the owners of the legal estate in the lease; as above mentioned, he has no claim on any of the deeds of the freehold title.

Common ownership in

It is a very common case, that property to which a set of title deeds

(*c*) If the title deeds are not in the possession of the vendor, the purchaser's solicitor must go to the place where they are, in order to compare them with the abstract; but the vendor must bear the expense of the journey. (*Sharp* v. *Page*, 1 Sugd. V. & P. 449, and an anonymous case there cited; *Hughes* v. *Wynne*, 8 Sim. 85). But it seems, that when the deeds are in London, a country solicitor will not be permitted to charge the expense of a journey thither to examine them, but must employ his agent for that purpose. (*Alsop* v. *Lord Oxford*, 1 My. & Ke. 466; *ante* Vol. 1, p. 48).

CONDITIONS AS TO TITLE DEEDS.

curing and making of all certificates, attested, stamped, office, or other copies or extracts of or from any re-

deeds relating to the property of different owners.

relates, is alienated in separate portions; and, in this case, the law seems to be, that the owner of each portion has, in equity, a common property in the deeds, and can, by a suit in equity, compel the owner of the portion in whose custody they are, to produce them for the benefit of the other owners. (*Fain* v. *Ayer*, 3 Sim. & Stu. 533; 1 Russ. 256, 259).

But the owner of any one portion has no right to take the deeds out of the hands of the owner of any other portion, they must remain in the custody in which accident has placed them. (*Yea* v. *Field*, 2 T. R. 708). And the right of the owner of any portion to retain the deeds, if he has chanced to get possession of them, is not taken away by his having previously taken a covenant for the production of the deeds. (*S. C.*) No person will be compelled at law to produce his title deeds. (*Pickering* v. *Noyes*, 1 B. & C. 262).

Purchaser entitled to a covenant for the production of deeds, or to the deeds.

A purchaser is not bound to rely on the equitable right to production; but is entitled to have either the deeds themselves, or a covenant for their production. (*Barclay* v. *Raine*, 1 Sim. & Stu. 449 *). On the sale of a reversion expectant on a lease in an undivided share of an estate, the court refused to compel a purchaser to complete, till the counterpart of the lease (which was in the possession of persons entitled to another share in the estate,) was deposited for the benefit of all parties, Lord Eldon observing, that it would be too much to put the purchaser to the necessity of filing a bill, from time to time, to have the counterpart delivered to him as often as he might want it. (*Shore* v. *Collett*, Cooper, 234). In this case, the purchaser had demanded a covenant for the production of the counterpart, and before the hearing the vendor had procured the counterpart to be inrolled in the Court of Common Pleas. Lord Eldon does not seem to have considered the inrolment as of any consequence in that case; but, in an opinion now before me, of a late eminent conveyancer, it is unhesitatingly laid down, that a purchaser cannot require a covenant for the production of a deed which has been inrolled. There seems, however, no good reason for this position.

It has been said, that a purchaser is entitled to have such a covenant for the production of deeds as will run with the land; and *Barclay* v. *Raine* is usually cited as an authority for the position. But that case (as corrected in the note), does not appear to support the doctrine.

In practice, such a covenant for the production of the deeds as will

* The report of the judgment in this case, as to whether the covenant did or did not run with the land, is said to be incorrect; the Master of the Rolls being of opinion, that, Thring's first covenant did run with the land, but, that his second covenant, was restricted to the period of his being mortgagee, (See 7 Byth. Conv. by Jarman, 375, note). This is, probably, the correct version of the case.

gisters (*d*), deeds, wills (*e*), or other documents, and of all declarations or other evidence as to identity, whether

CONDITIONS AS TO TITLE DEEDS.

run with the land, can seldom be had; and, therefore, relying on the equitable right to production, the want of such a covenant is seldom made an objection to the title, on behalf of a willing purchaser. And it is the opinion of a large part of the profession, that the want of such a covenant is in no case a valid objection to a title. In cases of this nature, a covenant is usually taken from the tenant for life, mortgagor, or other partial or equitable owner, or from any of the vendors who are in a situation to covenant, partly with a view to obtaining *some* legal right, although limited or insufficient; but, principally as an express declaration of the purchaser having an interest in the deeds. Assignees of a bankrupt, when selling property of which they retain the deeds, must enter into covenants for their production, limited to the time of their continuance as assignees; (*Ex parte Stuart*, 2 Rose, 215); and there seems no reason why the same rule should not apply to trustees and mortgagees. A memorandum of the covenant for production should be indorsed on the several deeds to be produced, so as to affect any future holder of them with notice of the covenant; although there is not much doubt that the equitable right to production subsists independent of the notice. It is at present an undecided point, whether, under a covenant for further assurance, the covenantor can be compelled to enter into a covenant for the production of deeds; the better opinion is, perhaps, against his liability. (*Fain* v. *Ayer*, 2 Sim. & Stu. 533; 1 Russ. 256, 259).

Custody of deeds between trustees and cestui que trusts.

The right to the custody of the title deeds follows the legal ownership of the freehold; and therefore, trustees, and not cestui que trusts, are the persons entitled to the custody of them. (*Harper* v. *Faulder*, 4 Mad. 129; see, too, *Pyncent* v. *Pyncent*, 2 Atk. 571). So, trustees are entitled to the custody of any settlement or other trust deed, of which they are the trustees, the cestui que trusts having merely a right to

(*d*) If the property be copyhold, insert here—
"court rolls."

Attested copies.

(*e*) A vendor is bound, at his own expense, to furnish every purchaser with attested copies of every document of title which is not to be delivered up to the purchaser; (*Dare* v. *Tucker*, 6 Ves. 460; *Boughton* v. *Jewell*, 15 Ves. 176); except of instruments on record. (*Campbell* v. *Campbell*, 1 Sugd. V. & P. 529; see, too, *ante*, Vol. 1, pp. 203, 215). Hence, therefore, whenever property is sold in lots, it should be stipulated, that the expense of all attested and other copies shall be borne by the purchaser requiring the same; for, otherwise, the vendor may be put to a ruinous expense. Indeed, in all cases in which attested copies may be required, it is better to stipulate that they shall be furnished at the cost of the purchaser.

CONDITIONS AS TO TITLE DEEDS.

required for the verification of the abstract (*f*), or for any other purpose, shall be at the [joint] expense of the

inspect and take copies of the deeds. (*Ex parte Holdsworth*, 4 Bing. N. C. 386).

Tenant for life and remainder-man.

When the inheritance is carved out into portions, the owner of the first estate of freehold (generally a tenant for life,) is entitled to the custody of the deeds, because on him it falls to defend the title. (*Webb* v. *Lord Lymington*, 1 Eden, 8; *Duncombe* v. *Mayer*, 8 Ves. 320; *Knott* v. *Wise*, cited 8 Ves. 323; 1 Ves. Jun. 76; 3 Ves. 225; 1 Scho. & Lef. 223; 2 Bro. C. C. 652). If, however, there be a term of years preceding the life estate, the tenant for life will be compelled to produce the deed, for the benefit of the termor. (*Brigstocke* v. *Mansel*, 3 Mad. 47). The cases with respect to the rights of remainder-men are numerous, and not very consistent; but it appears to be settled, that a remainder-man has a right to see the deeds, and to have them brought into court for safe custody, if his remainder be immediate and vested; (9 Mod. 132; 1 Atk. 431; 3 Atk. 382; 2 P. Wms. 476; 2 Ves. 611, 612; 1 Ves. Jun. 76); and this right is strengthened, if the tenant for life is the person who would be entitled in fee if the settlement were destroyed. (1 Atk. 431). But a remainder-man, whose estate is not immediately expectant on an estate for life, (*Ivie* v. *Ivie*, 1 Atk. 431), or the purchaser of a contingent remainder, (*Noel* v. *Ward*, 1 Mad. 322), has no such right. If a remainder-man in tail be the son of the tenant for life, he has no right to inspect

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Verification of abstract.

(*f*) If the words relating to the verification of the abstract be omitted, the condition will only protect the vendor from the necessity of furnishing the purchaser with attested or other copies of instruments which have been produced for the verification of the abstract, but cannot be delivered up to the purchaser, and from the necessity of producing instruments which are not essential to the verification of the abstract. In that case, the vendor must make out a complete abstract, and verify it, not only by the production of all the evidence in his possession, but by producing and procuring, at his own expense, every deed, certificate, extract, office copy, and other document, required for such verification. For the purchaser has a *prima facie* right to have the abstract verified by the vendor, and he cannot be deprived of this right by ambiguous expressions.

Any office copies, certificates, or extracts, which the vendor may procure for the verification of the abstract, will, after being procured, be muniments of title in the vendor's possession, and will follow the destination of the other muniments, either into the hands of the purchaser, or to any other quarter. It may be remarked, that where a property held by one title is sold in lots, the vendor should verify the abstract at his own expense; for otherwise the whole expense would fall on the first purchaser who called for the verification, and the others would have the benefit at his cost.

purchaser requiring the same (*g*), [and of the vendor, in equal shares].

CONDITIONS AS TO TITLE-DEEDS.

the deeds, or to have them taken out of the custody of his father, unless he can shew that he needs them for some *proper* purpose; (*Lord Lempster* v. *Lord Pomfret**, Amb. 154; *Pyncent* v. *Pyncent*, 3 Atk. 571†); but what is a proper purpose seems undetermined. In one case, as between a father and son, and a mortgagee of the father's life estate, a deed was ordered to be deposited for the benefit of all parties. (*Crop* v. *Norton*, 2 Atk. 74).

All the cases however, admit, that if any person entitled in remainder can shew, that there is danger of the deeds being destroyed if they remain in the custody of the tenant for life, the remainder-man is entitled to have them properly secured. (See the preceding cases, and *Dixies* v. *Hillary*, Cary, 19). But although the deeds may have been in court for other purposes, they will not be retained without reason shewn to the court. (*Webb* v. *Lord Lymington*, 1 Eden, 8; *Duncombe* v. *Mayer*, 8 Ves. 320; *Church* v. *Small*, Id. 322).

It is said, that if only an estate for life be subsisting prior to a reversion

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(*g*) The stipulations in this condition will not all be applicable on every sale; of course, those only should be employed which are necessary. The words in brackets, (as is obvious), divide the expense equally between vendor and purchaser.

The rule, that in the absence of stipulation to the contrary, the vendor must bear the expenses mentioned in this condition, has encouraged a disposition in purchasers to carry their requisitions on these matters to the furthest length that the law allows; frequently to the great injury of the vendors, and with very little benefit to themselves. And hence, it has been found useful to check this disposition, by stipulating that purchasers shall bear the whole, or some part of the expense which their requisitions occasion; a stipulation to that effect is found to confine their requisitions to such evidence as is needful to make out a reasonably good and safe title.

The expense of making out the title falls, *prima facie*, on the vendor.

It must, however, be understood, that no condition as to the custody or the expense of production of the muniments of title, can preclude the purchaser from requiring a perfect title. To have that effect, the stipulation must be direct to the purpose and clear. (*Dick* v. *Donald*, 1 Bligh, N. S. 655; *Southby* v. *Hutt*, 2 My. & Cra. 207).

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* In Mr. Blunt's edition of Ambler, (2nd edit. 1828,) there is an error in the report of this case. In line 4, from the top, it should be, "this court will *not* give," instead of "this court will give."

† In this case, however, so far as the same can be understood, the trustees of the grandfather's settlement were the persons entitled to the custody of the deeds.

CONDITIONS AS TO TITLE-DEEDS.

II. That no purchaser shall be entitled to call for the production of, or make any objection on account of the nonproduction of, any deeds or muniments of title, of which the vendor shall produce attested copies (*h*).

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in fee, the reversioner, upon confirming the life estate, is entitled to have the deeds delivered up to him. (*Joy* v. *Joy*, 2 Eq. Ca. Abr. 284). If such, however, be the law, it would seem, that the reversioner must undertake to defend, as well as confirm the title of the tenant for life. A jointress will be ordered to give up her jointure deed, and the other title deeds, on having her jointure confirmed by the person entitled in reversion or remainder; (*Petre* v. *Petre*, 3 Atk. 511; *Leech* v. *Trollop*, 2 Ves. 662; see, too, *Chamberlain* v. *Knapp*, 1 Atk. 52; 2 Ves. 450; 1 Ves. Jun. 76); and the same rule is said to apply to a dowress. (2 Bro. C. C. 652).

Mortgagee and mortgagor.

A mortgagee, whose security turns out to be bad, may retain his mortgage deed, if it contains a covenant for payment of his mortgage money. (*Opie* v. *Godolphin*, 2 Eq. Ca. Abr. 284; Prec. in Cha. 548). A mortgagor has no right to inspect the deeds while in the hands of a mortgagee, for any purpose whatever.

If deeds are stolen from the custody of a mortgagee, his security is not thereby affected, as against the mortgagor, and he is not liable to make any compensation to the mortgagor for the injury to the title; but, on a reconveyance, he must give the mortgagor an indemnity against being called on to pay over again the mortgage money and interest. (*Stokoe* v. *Robson*, 3 Ves. & Bea. 51; 19 Ves. 385; *Shelmardine* v. *Harrop*, 6 Mad. 39). But a mortgagee will not be allowed to sue a mortgagor upon a bond given as a collateral security, if he has put it out of his own power to produce the title deeds, and cannot, therefore, give them up on a reconveyance. (*Schoole* v. *Sall*, 1 Scho. & Lef. 176). Some observations as to the loss of title deeds, as between vendor and purchaser, will be found in the next note.

Right to drafts and copies of deeds.

In concluding the observations on this subject, it may be proper to notice, that drafts and copies of instruments belong to the persons at whose expense they are made; and that, whether such persons are or are not entitled to the custody of the original instruments. *Ex parte Horsfall*, 7 B. & C. 528; *Ex parte Holdsworth*, 4 Bing. N. C. 386; *Doe.* d. *Strode* v. *Seaton*, 2 Ad. & Ell. 171; *Davidson* v. *Napier*, 1 Sim. 297.

Abstract to be verified by the production of original documents.

(*h*) A vendor is bound to produce the original documents required to make out his title; to produce attested copies is of no avail, unless the originals are lost; (*Harvey* v. *Phillips*, 2 Atk. 541; *Southby* v. *Hutt*, 2 My. & Cra. 207; *Bryant* v. *Busk*, 4 Russ. 1; *Skeffington* v. *Whitehurst*, 3 You. & Col. 1); or are upon record, as in case of wills, and inrolled deeds. (Ante, Vol. 1, pp. 214, 215; 1 Sugd. V. & P. 529). And a purchaser cannot be compelled to compare the abstract with the instruments

CONDITIONS AS TO TITLE-DEEDS.

III. That the purchaser of lot —— shall presume that a lease for a year, which cannot now be found, but which is mentioned in a release dated the —— day of ——, was duly made between, and executed by, the persons by whom, in the said release, the same is mentioned to have been made, and shall make no objection on account of the said lease for a year not being produced (*i*).

IV. That, as an indenture dated the —— day of ——, cannot now be found, the purchaser shall be satisfied with the production of a document purporting to be a copy thereof, and shall take such copy as conclusive evidence of the contents of the original deed, and shall presume that the original deed was duly executed and attested (*j*).

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on record, but has a right to be furnished at the vendor's expense with attested or office copies of them; this is the well-known practice with respect to wills and court rolls. (See ante, Vol. 1, pp. 214—218).

If the title deeds have ceased to exist, their due execution and contents may be proved by competent secondary evidence; (*Bryant* v. *Busk*, 4 Russ. 1); but it would seem from that case, that it is requisite that the names of the attesting witnesses should be known, which, when the deeds have been destroyed, it is, in most cases, impossible to ascertain. In such a case, the only means of remedying the defect are, to sell, subject to a stipulation that the purchaser shall take such title as the vendor has; or to a stipulation, in which the state of the title is explained, and it is made incumbent on the purchaser to accept such evidence of the contents of the deeds as the vendor may happen to possess. (See Conditions III. and IV., and CONDITIONS AS TO TITLE, infra, page 61).

Leases for a year.

(*i*) The leases for a year, especially in old family titles, are frequently missing; if they belong to recovery deeds, the defect is supplied by statute; (*Holmes* v. *Aislabie*, 1 Madd. 551); in other cases, the matter may be left to the general presumption of the law, or may be mentioned in a special condition, as in the text. A condition, however, is hardly needful, unless the conveyance to which the lease belongs be of recent date.

(*j*) See supra, note (*h*). This condition may be adapted to the case of more than one, or of all the deeds being lost, if plain copies of them exist. With a slight alteration, likewise, it will meet the case of an abstract of a deed, being the only evidence that can be supplied of its contents.

CONDITIONS AS TO TITLE-DEEDS.

V. (*k*). That the purchaser of the largest part in value, [of any lots held partially or wholly under the same title], shall, after the sale of all the [said] lots, be entitled to the custody of such of the muniments of title [relating thereto], as are in the possession of the vendor; but such purchaser shall enter into the usual covenants with the purchasers of the remainder of the [said] lots for the production and furnishing copies of the said muniments. If any of the [said] lots shall not be sold, the vendor shall retain the said muniments, and enter into the usual covenants for the production and furnishing copies of them, with the purchasers of such of the [said] lots as shall have been sold, such covenants nevertheless to be determinable on the vendor's parting with the said muniments, and procuring the person to whom they shall be delivered, to enter into the usual covenants for the production and furnishing copies of them with the persons then entitled to the benefit of the vendor's covenants. The deeds containing any such covenants as aforesaid, whether original or substituted, shall be prepared by and at the expense of the covenantees.

VI. (*l*). That the purchaser of lot —— shall be entitled to the custody of such of the muniments of title [relating

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Destination of title deeds when an estate is sold in lots of nearly equal value,

(*k*) When an estate is sold in lots, or when the title deeds of the estate relate to other property of the vendor, it is usual and proper to make a provision in the conditions or contract of sale, for the destination of the muniments of title, and for giving facility to all persons who may become interested in them, to inspect and obtain copies of them, as occasion may require. The fifth condition in the text is suited to the case in which the whole estate, to which the muniments relate, is offered for sale in lots, of which no one far exceeds the rest in value; if there be the same title to all the lots, the words which refer to different sets of lots held under different titles, and which are printed in brackets, should be omitted.

—in lots of very different value,

(*l*) The sixth condition is suited to the case in which the whole estate, to which the muniments of title relate, is offered for sale in lots, of which one far exceeds the rest in value, and to the purchaser of that lot the muniments are assigned. The words in brackets have the same purpose as those in the preceding condition.

thereto,] as are in the vendor's possession, but he shall enter into the usual covenants with the purchasers of the other lots, [which are held either partially or wholly under the same title as lot ——,] or with the vendor, so far as relates to any of the [said] lots which may not be sold, for the production and furnishing copies of the said muniments. If lot —— shall not be sold, the vendor shall retain, &c. [*as in fifth condition.*]

CONDITIONS AS TO TITLE-DEEDS.

VII. (*m*). The vendor shall retain such of the muniments of title [relating to lots —— and ——,] as relate to other property of the vendor, and shall enter into the usual covenants with the purchasers [of the said lots,] for the production and furnishing copies of the said muniments, such covenants, nevertheless, to be determinable &c. [*as in fifth condition.*]

(*m*) The seventh condition applies to the case in which only a part of the property to which the muniments of title relate, is offered for sale, and the vendor intends to retain them in his own custody. The words in brackets may be omitted, when all the lots have the same title. Occasionally it is stipulated, that the vendor shall have the option of retaining the muniments, and covenanting for their production, or of giving them up to the purchaser of the largest part in value, or the purchaser of a particular lot, and compelling him to covenant for their production. But this practice is not to be recommended; the vendor ought to decide before the sale, whether he will retain or give up the muniments, and stipulate accordingly. Vendors generally prefer to retain the muniments, for they feel and understand the danger and inconvenience of parting with them, while the liability to which a covenant for production subjects themselves is remote, and not very perceptible to an unprofessional person. In practice, very little injury does result to persons from entering into covenants to produce deeds; for if the covenant or parts with the deeds without procuring himself to be exonerated from his covenant, the covenantee usually prefers to trace the deeds, and obtain the inspection of them by his equitable right, than to bring an action against the covenantor, in which he could only recover damages—perhaps of trifling amount.

—when part of an estate is sold.

It is very seldom stipulated on sales, that the title deeds shall be deposited for the benefit of all parties; but it may sometimes be desirable to stipulate, that a particular deed shall be so deposited in the hands of some banker, or other person named in the condition, or to be selected by the parties. The form of such a condition must depend on the circumstances of each case.

As to the deposit of title deeds.

CONDITIONS AS TO TITLE-DEEDS.

VIII. That no purchaser shall be entitled to require any covenant, or make any objection on account of the want of any covenant, for the production or furnishing copies of any of the muniments of title, which are not in the possession of the vendor (*n*).

IX. That as to such of the muniments of title as are not in the possession of the vendor, but to the benefit of a covenant for the production of which he is entitled, [*or*, but for the production of which a covenant is in the possession of the vendor,] the purchaser shall be satisfied with such covenant, and shall make no objection on account of the insufficiency or invalidity of such covenant (*o*).

CONDITIONS AS TO TITLE AND EVIDENCE.

CONDITIONS *as to* TITLE, *and* EVIDENCE *of* TITLE.

I. THAT every recital or statement, in any deed, will, or other document, dated thirty years or upwards prior to the day of sale, shall be deemed conclusive evidence of the fact or matter recited or stated (*a*).

(*n*) This condition is essential, if any of the muniments of title are not in the vendor's possession, and he has no covenant and no means of obtaining a covenant for their production. (See ante, page 46).

(*o*) This covenant meets the case of an existing covenant for production of deeds, not being such as a purchaser can be compelled to accept. (See ante, pages 46, 47). The words in brackets should be substituted for those immediately preceding, if the existing covenant was not made with the vendor himself.

Recitals and statements in documents may, by stipulation, be made evidence of title.

(*a*) It often happens, that, from the deaths of parties, the imperfections of registers, and other circumstances, it becomes difficult or impossible to furnish proper evidence of the facts on which a title depends, but that, at the same time, those facts are recited or stated in some of the documents of title. When this is the case, either the first or second condition in the text may be advantageously employed, to compel the purchaser to take the recital or statement in the document as evidence of the fact recited or stated. The first condition is the preferable one, as being much less alarming to a purchaser, and equally efficient in ordinary cases with the second. It is essential, in the circumstances above mentioned, to make a

CONDITIONS AS TO TITLE AND EVIDENCE.

II. That every deed, will, or other document, dated twenty years, or upwards, prior to the day of sale, shall be deemed conclusive evidence of any birth, death, intestacy, heirship, representation, or other fact, [and of the contents and due execution of any deed, will, or other document], which shall be recited, stated, noticed, assumed, or implied therein (*b*).

III. That extracts from registers kept by any society or congregation of dissenters, of births, baptisms, deaths, or burials, shall be deemed conclusive evidence thereof (*c*).

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special stipulation, because, independent thereof, a recital or statement in any document is no evidence of the fact recited or stated, except as against the parties to the documents and those who claim through them. (*Fort* v. *Clark*, 1 Russ. 601, ante, Vol. 1, pp. 193, 194).

As to the time to be fixed for the purpose.

The time specified in the condition must be such as will meet the exigency of the case; the period usually fixed is twenty, or thirty, years, for a shorter period would, probably, seriously affect the sale, and, of facts mentioned in instruments dated forty years ago and upwards, a willing purchaser, in ordinary cases, does not strongly press for evidence, when there is difficulty in procuring it. The period should always commence as far back as the title will permit.

Conditions of this kind to be used with caution.

Conditions of this class are a very favourite resort of vendors, because they tend to save expense. They do not, probably, in common cases, much prejudice a sale, because purchasers do not understand their effect; but if their effect were known, few persons would risk their money in a purchase subject to stipulations, which, undoubtedly, preclude them from getting any reasonable evidence of the facts on which the title depends. It is very well known that little reliance can be placed on the truth of recitals and statements in documents, till lapse of time has confirmed them, as they are constantly made without any sufficient authority.

A condition is sometimes made, (see the words within brackets in the second Condition), that the recitals of deeds and other documents, not in the vendor's possession, shall be conclusive evidence of the contents and due execution of those deeds and documents. Nothing, however, but absolute necessity can authorize the use o fit; no purchaser, who understood its effect, would buy subject to it.

(*b*) See the preceding note.

Extracts from the registers of Quakers, &c. not evidence, except by special stipulation.

(*c*) The registers of Quakers, Jews, dissenters, and other societies or persons not authorized by law to keep registers of these matters, are admissible in evidence, simply as declarations, and not as records. (Ante, Vol. 1, p. 178, and cases there cited). Extracts from such registers are however, usually accepted by conveyancers as sufficient evidence of the facts they record, and, therefore, it is only with a view to an action at

CONDITIONS AS TO TITLE AND EVIDENCE.

IV. That all statements in parochial registers, [or in registers kept by any society of dissenters of baptisms or burials,] shall, as to the identity, day of birth, or death, parentage, or relationship of any person named in such register, be deemed conclusive evidence thereof (*d*).

V. That the title to lot —— shall commence with marriage articles, dated the —— day of ——, and the title to lot ——, with indentures of lease and release, dated respectively the —— and —— days of ——; and no purchaser shall, on any account whatever, be entitled to call for the production of, or to investigate, or to make any objection whatever in respect of, the earlier title to either of the said lots (*e*).

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law, or a suit for specific performance, that it is needful expressly to stipulate that such evidence shall be deemed conclusive. The condition in the text will, of course, when necessary, be altered to suit the nature of the register, and the society or persons by whom it is kept.

Statements in registers not evidence except by stipulation.

(*d*) The advantage of employing this condition in the cases for which it is intended, is fully explained in the first volume of this work, p. 176, and by the cases there cited. The part of the condition referring to the dissenters can be omitted, if the registers are exclusively parochial; or may be altered like the preceding condition to meet the case of other societies or persons. This condition, likewise, is framed chiefly with a view to proceedings in a court of law or equity.

With respect, generally, to secondary evidence of pedigree, and to other evidence of descent, and to the late act for the registration of births, marriages, and deaths, see ante, Vol. 1, bk. 1, ch. 3, sect. 1.

Stipulations as to the length of title a purchaser may require.

(*e*) A purchaser has a right to require a title commencing at least sixty years before the date of his conveyance. (Ante, Vol. 1, pp. 139, 144). But as it often happens that, from the loss of deeds and other circumstances, a vendor cannot give a title commencing so long before the purchase, he must have recourse to a special stipulation to preclude the purchaser from requiring the production of the title, prior to the period from which it can be furnished. Precedents of such stipulations suited to different cases are given in the text. It should, however, be observed, that in cases in which the difficulty simply is that the earlier title is altogether wanting, it is useless to stipulate that the purchaser shall not investigate or make any objection in respect of the earlier title; it is enough to preclude him from calling for its production. But if the earlier title is objectionable or defective, then the purchaser should be precluded from investigating or objecting to it, even if he chooses to examine it at his own expense. (See *Shepherd* v. *Keatley*, 1 Cro. Mee. & Ros. 117).

CONDITIONS AS TO TITLE AND EVIDENCE.

VI. That the title to lot —— shall commence with indentures of lease and release, dated respectively the —— and —— days of ——, whereby the property comprised in that lot was conveyed to the vendor in fee simple, [*or*, to uses in favour of the vendor,] and the purchaser of that lot shall, on no account whatever, be entitled to call for the production of, or to investigate, or to make any objection whatever in respect of, the earlier title to the said lot (*f*).

VII. That, as to lot ——, the title to which commences with a will, dated in the year ——, of a testator who died in the year ——, [*more than sixty years previously*,] the purchaser shall not require any evidence of the seisin of the testator (*g*).

VIII. That, as to lot ——, the title to which commences with a general devise of real estate, made by a will dated in the year ——, of a testator who died in the year ——, [*more than sixty years previously*,] the purchaser shall presume that the testator was seised of the property included in that lot, and that the same passed by such general devise (*g*).

IX. That, as to part of the property comprised in lot ——, the title to which is derived under an award made to A. B. in the year ——, under an inclosure act, in respect of his common lands and rights in the parish of ——,

Title commencing with conveyance to vendor.

(*f*) It is sometimes the case, that a vendor wishes to shew or can shew no title, except the conveyance to himself. This may happen when the property has formerly been part of a large estate, of which the title is very voluminous and intricate, or when the vendor himself has purchased without a title, and in other circumstances. In such cases, the condition in the text will be applicable. If, however, the property has formerly been part of a large estate, of which the title has been often investigated and is well known, it will be prudent to state that fact in the condition, for the condition in its present form will seriously prejudice a sale.

Seisin of testator, when title commences with a will.

(*g*) The way in which seisin may be proved, is stated ante, Vol. 1, pp. 173, 174. When evidence of seisin cannot be procured, the sale should be made subject to the seventh or eighth condition in the text, or to such similar condition as the circumstances of the case may require. If the will with which it is intended that the title shall commence, is dated, or the testator has died, within sixty years, these conditions must be combined with the forms given in the fifth and sixth conditions, so as to preclude the purchaser from requiring the earlier title.

CONDITIONS AS TO TITLE AND EVIDENCE.

the purchaser shall presume the validity and regularity of the said award, and that A. B. had then no other common lands or rights in the said parish, than those to which a title will be shewn by the vendor (*h*).

X. That the title to lot —— shall commence with an award made in the year ——, under an inclosure act; and the purchaser of that lot shall not be entitled to call for the production of, or to investigate, or to make any objection in respect of, the title to the lands or rights in respect whereof the land comprised in that lot was awarded, and shall presume that the said award was in every respect duly and regularly made according to the provisions of the said act, and shall in nowise whatever question the validity of such award (*i*).

XI. That the title to lot —— shall commence with an award, made to A. B. in the year ——, under an inclosure act; and the purchaser of that lot shall presume the validity and regularity of the said award, and that, by virtue of it, A. B. became seised of an estate of inheritance in fee simple, both at law and in equity, in the land awarded (*i*).

XII. That, as to lot ——, the property comprised in which was taken under an exchange effected in the year ——, the purchaser shall not be entitled to call for the production of, or to investigate, or to make any objection in

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Titles under awards in pursuance of inclosure acts.

(*h*) If there be no stipulation to the contrary, the vendor must shew that the award was made in strict conformity with the provision of the act of inclosure, and with all other statutory requisitions. (Ante, Vol. 1, p. 165). But as it is often desirable to relieve the vendor from so difficult a task, recourse is had to special conditions, of which precedents will be found in this and the two succeeding conditions. The latter part of this condition will be useful, in case the award has been made to A. B. in respect of his common lands and rights, generally.

Titles under awards in pursuance of inclosure acts.

(*i*) A vendor of lands held under an award must (unless there be a stipulation to the contrary) shew a good title to the lands or rights in respect of which the award is made. (Ante, Vol. 1, p. 164). But as this is frequently impossible or very inconvenient, the vendor protects himself from the liabilities, by a special condition. The tenth and eleventh conditions in the text are precedents of that kind.

They may also be employed with advantage, where an entire award has been made in respect of land held under different titles. (See ante, Vol. 1, p. 164; and infra, CONDITIONS AS TO IDENTITY, Cond. III.)

respect of, the title to the said property, prior to the said exchange, or the title to the property given in exchange (*k*). CONDITIONS AS TO TITLE AND EVIDENCE.

XIII. That, as to lot ——, the property comprised in which was formerly of copyhold [*or*, customary] tenure, and was enfranchised in the year ——, the purchaser shall not be entitled to call for the production of, or to investigate, or make any objection, in respect of the title of the lord by whom the said land was expressed to be enfranchised, or require any evidence of his right or power to make such enfranchisement, or of the validity of such enfranchisement (*l*).

XIV. That the vendors shall not be required to produce or procure copies of any grants from the crown, under which any of the property described in the particular is or may have been held (*m*).

(*k*) As an exchange confers a right of re-entry on the lands given, in case of eviction from those taken in exchange, it becomes necessary, on a sale of any lands which have been taken in exchange, to shew the title, not only of the lands sold, but also of those which were given in exchange for them. (Ante, Vol. 1, p. 170). When this is likely to be expensive or troublesome, the necessity of it is removed by a special stipulation; which, however, has the effect of precluding the purchaser from obtaining a safe title. Titles under exchanges,

In exchanges effected under inclosure acts, the difficulty seldom arises; (ante, Vol. 1, p. 171); but, in every case, the inclosure act should be examined before the sale, and a condition, if need be, adapted thereto. Some further information on the subject of exchanges will be found in the first volume of this work; Art. EXCHANGES.

(*l*) If the title depends on an enfranchisement, it is requisite to produce and prove, not only the copyholder's title, but also the title of the lord to enfranchise. (Ante, Vol. 1, p. 169). But, as the title of the lord is frequently from settlements, and other arrangements incident to large properties, long and intricate, and is, moreover, not always accessible to the owner of the enfranchised property, he generally protects himself against being called on to produce it to a purchaser. The condition in the text is framed with that view. —under enfranchisements,

(*m*) If the title depends on a grant from the crown, it is usual for the purchaser to require the production of the grant, or an attested copy of it, and the usual deduction of title, for a period of not less than sixty years before the date of the purchase. (Ante, Vol. 1, p. 157). The deduction of the intermediate title cannot be required. It is probable, that occasion will seldom arise for the employment of the condition in the text, since a grant from the crown can generally be found and examined. As —grants from the crown,

CONDITIONS AS TO TITLE AND EVIDENCE.

XV. That the title to lot —— shall commence with a grant by the lord of the manor of ——, [by his steward] out of the waste of the said manor, by copy of court roll, dated the —— day of ——, and the purchaser shall not be entitled to call for the production of, or to investigate, or to make any objection, in respect of any prior title to that lot, or to require any evidence of the right or power of the lord [*or* steward] of the said manor, to make grants by copy, of the waste thereof (*n*).

XVI. That, as a [small] part of the property comprised in lot —— consists of an addition made thereto, in the year ——, by inclosing a strip of waste land, which lay between the old inclosure, and the high road, the purchaser shall not be entitled to call for the production of, or to investigate, or to make any objection in respect of, any prior title to such new inclosure, or to require any evidence of the right of the owner of the old inclosure to make such new inclosure (*o*).

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the precedent given does not preclude the purchaser from examining the grant, he will, generally, be advised to obtain an inspection of it, at his own expense: but, if it be deemed better, to prevent any question being made respecting the grant, a form of condition should be used, similar to the precedents given in other cases.

—grants of wastes of manors,

(*n*) Lands, which are parcel of the waste of a manor, if newly granted by copy of court roll, by virtue of an immemorial custom to demise parcels of the waste as copyhold, are as much copyhold in tenure, as though they had been immemorially holden by copy of court roll; (*Lord Northwick* v. *Stanway*, 3 Bos. & Pull. 346); but if there be no such immemorial custom, such a grant of the waste as aforesaid is invalid to create either a copyhold estate, or an estate in fee simple. (*Rex* v. *Hornchurch*, 2 B. & Ald. 189; *Rex* v. *Wilby*, 2 Mau. & Selw. 504). In practice, it is extremely difficult to make proof of a custom, which, from its nature, is seldom exercised; and, therefore, in a sale of lands, which have been granted out of the waste, a vendor should always protect himself by the condition in the text, or some similar stipulation.

—to strips of land by the side of the road.

(*o*) It is the prima facie presumption of law, that waste land on the sides of, and the soil to the middle of, an ancient highway, belongs to the owner of the adjoining land, whether such adjoining land be freehold or copyhold, and not to the lord of the manor, or the crown. (*Steel* v. *Prickett*, 2 Stark. 463; *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; *Goodtitle* d. *Chester* v. *Alker*, 1 Burr. 133). But such presumption does not arise, where the highway is modern, and defined by a newly created

CONDITIONS AS TO TITLE AND EVIDENCE.

XVII. That the purchaser of lot ——, shall take the same, with the title under which it is now held by the vendor. An abstract of this title may be seen at the office of [*vendor's solicitor,*] on any day before the sale, and will be produced at the sale (*p*).

XVIII. That the purchaser of lot ——, shall presume that the vendor is seised in fee simple, both at law and in equity, of the property comprised therein, and shall not be entitled to call for the production of, or to investigate, or make any objection in respect of the title thereto (*p*).

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authority, as under the General Inclosure Act. (*Rex* v. *Hatfield*, 4 Ad. & Ell. 156). And in the case of an ancient highway, to establish the right of the lord of the manor to such waste land and soil, acts of ownership by the lord, or grants by him of the waste, between the road and other inclosures, as well adjoining to as at a distance from the land disputed, are admissible in evidence. (*Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332, S. C., 2 Bing. N. C. 102). If the strip of land communicate with an open common, the presumption is much weakened; for the evidence of ownership, which applies to the larger portions, applies also to the strips. (*Grose* v. *West*, 7 Taunt. 29. See, too, as respects the evidence admissible in such cases, *Stanley* v. *White*, 14 East, 322; *Jones* v. *Williams*, 2 Mee. & Wels. 326; *Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554; *Hollis* v. *Goldfinch*, 1 B. & C. 205).

The presumption of law, and the rules as to evidence, seem to be the same with regard to the waste land on the side of a river and the bed of a river. (*Jones* v. *Williams*, and *Hollis* v. *Goldfinch*, ubi supra).

In the case of a sale of lands, which comprise any inclosed strips of waste, it should be stipulated according to the form in the text, that the purchaser shall make no objection to the title. To make out by evidence such a title as a purchaser could be compelled to take, would, in most cases of this kind, be a difficulty almost insurmountable.

On selling an estate with such title as the vendor has.

(*p*) A vendor may, if he choose, stipulate for the sale of an estate with such title only as he happens to have; but he must make his intention perfectly clear, or he will fail in depriving a purchaser of the right to a good title. (*Freme* v. *Wright*, 4 Mad. 364; *Wilmot* v. *Wilkinson*, 6 B. & C. 506; *Southby* v. *Hutt*, 2 My. & Cra. 207). The seventeenth and eighteenth conditions in the text are intended to have the effect of making it incumbent on the purchaser to accept the property, either with the vendor's title, whatever it may be, or without any title at all. Of course, the latter condition will only be employed in desperate cases, since mere possession is no evidence of title. In using the seventeenth condition, it will always be prudent to add the notice respecting the inspection of the abstract before the sale.

CONDITIONS AS TO TITLE AND EVIDENCE.

XIX. That no purchaser, whose entire purchase-money shall fall short of £ ——, shall be entitled to a copy of the abstract of the title of the vendor, unless the same be made at the expense of such purchaser, but an abstract of the title of the vendor shall be produced at all times before the said [*the day for completion,*] —— day of ——, at the said office of [*vendor's solicitor*], for the inspection of the several purchasers, whose respective purchase-money shall fall short of the said sum of £——, and their respective solicitors and counsel. And that, within —— from the day of the sale, the vendor shall, at his own expense, deliver to every purchaser, whose entire purchase-money shall amount to or exceed the said sum of £——, or his solicitor, a copy of the said abstract (*q*).

XX. That if the counsel for any purchaser shall be of opinion that a good title cannot be made to the whole or some part of the property taken by such purchaser, the vendor shall be at liberty either to annul, or to attempt to enforce the contract for such purchase at his discretion, and in case he shall annul the contract for such purchase, it shall be sufficient for him to repay the deposit paid in respect thereof, without any interest for the same, or for any other part of the purchase-money, and he shall not be liable to pay to the purchaser any of the expenses of investigating the title or otherwise (*r*).

(*q*) This condition is framed with a view to the case where a large estate, of which the title is very voluminous, is sold in several lots. The expense of making many copies of a large abstract is very great.

Purchaser entitled to payment of his costs if the title prove bad.

(*r*) In case of a sale without special stipulation, if the title of the vendor prove defective, the purchaser may, in an action on the contract, recover back from the vendor the expenses of investigating the title; (*Turner* v. *Beaurain*, 1 Sugd. V. & P. 239; *Kirtland* v. *Pounsett*, 2 Taun. 145, 146; *Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492; see, too, *Clare* v. *Maynard*, 1 Nev. & Per. 701); but not in an action for money had and received. (*Camfield* v. *Gilbert*, 4 Esp. 221; *Gosbell* v. *Archer*, 2 Ad. & Ell. 500). Among the expenses of investigating the title, which the purchaser may recover, are, the expense of comparing the deeds with the abstracts, and of searching for judgments, and journeys for that purpose, and the usual charges for perusing the abstract; (*Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492); but he cannot recover expenses

CONDITIONS AS TO TITLE AND EVIDENCE.

XXI. That if the counsel for any purchaser shall be of opinion that a good title cannot be made to the whole or some part of the property taken by such purchaser, without the production of evidence not in the possession of the vendor, the contract for such purchase shall be absolutely void, and it shall be sufficient for the vendor to repay the deposit paid in respect thereof, without any interest for the same, or for any other part of the purchase-money, and he shall not be liable to pay the purchaser any of the expenses of investigating the title or otherwise (*r*).

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incurred previously to entering into the contract, nor the expense of a survey of the estate, nor of a conveyance prepared in anticipation of the completion of a purchase, nor the extra costs beyond taxed costs of a suit for specific performance, in which the vendor had been defeated. S. C. It has been generally considered that a purchaser cannot recover any (except nominal) damages for the loss of his bargain when occasioned by the inability of the vendor to make a good title. (*Flureau* v. *Thornhill*, 2 W. Black. 1078; *Walker* v. *Moore*, 10 B. & C. 416; *Clare* v. *Maynard*, 1 Nev. & Per. 701). But where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots, and engaged to make a good title by a certain day, and the original vendor refused to convey to him, so that he was unable to fulfil his engagement, it was held that a sub-purchaser might recover damages for the loss of his bargain. (*Hopkins* v. *Grazebrook*, 6 B. & C. 31; see, however, *Walker* v. *Moore*, ubi supra). In cases where the title of the vendor proves defective, the purchaser may recover, not only his deposit and interest thereon, (see supra, note (*c*), page 30), but also interest on the remainder of his purchase-money, if it have been lying unproductive. (*Flureau* v. *Thornhill*, ubi supra).

The object of the twentieth and twenty-first conditions in the text, is to preclude the purchaser from recovering more than his deposit, if the title prove defective; one of them should be invariably used, if there be any reason to suspect the validity of the title, and there has not been sufficient opportunity for a due examination of it. But conditions of this nature are calculated to raise suspicions, because they cast upon the purchaser an expense which would be more fairly borne by the vendor, and because they lead to a belief that the vendor knows his title to be open to doubt.

Neither vendor nor purchaser can take advantage of his own default.

A proviso "that in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon," was held to mean, that if the vendor could not make a good title by the time

CONDITIONS AS TO ASSIGNMENT AND SURRENDER OF TERMS.

CONDITIONS *of* SALE *as to the* ASSIGNMENT *and* SURRENDER *of* TERMS.

I. THAT all assignments of satisfied terms, (whether already assigned to attend the inheritance or not), shall be prepared by and at the expense of the purchaser requiring the same, and the expense of deducing the representation to the person or persons in whom any such term is now vested, or of taking out letters of limited administration to the last person in whom the same was vested, shall also be borne by such purchaser (*a*).

II. That, as to lot ——, a term of —— years, which was

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mentioned, the contract should be void as against him, if the purchaser thought fit, but not otherwise; and that, if the purchaser did not pay his money, the contract should be void as againt him, if the vendor thought fit, but not otherwise. (*Roberts* v. *Wyatt*, 2 Taun. 268). However, in the case of a similar proviso, it has since been held that a purchaser cannot elect to accept a bad title with a compensation; (*Williams* v. *Edwards*, 2 Sim. 78); but see *Malins* v. *Freeman*, 4 Bing. N. C. 395, on the construction of a similar clause in an act of parliament.

If any part of the auction duty be made payable by the purchaser, the conditions in the text should extend to the return of that as well as of the deposit.

Costs of deducing title to and assigning terms.

(*a*) The general rule, with regard to the expense of deducing a title to terms of years, and assigning them to attend the inheritance, is as follows; that if the term has been already assigned to attend the inheritance, the title to it must be deduced at the expense of the vendor, and the assignment of it made at that of the purchaser; but if the term has never been assigned to attend the inheritance, the expense, both of the deduction of the title, and of the assignment, must be borne by the vendor. (1 Sugd. V. & P. 465). The condition in the text should be used with caution, and only when the expense incident to the titles and assignments of terms is likely to be very heavy; for the purchaser will, if well advised, reduce his biddings considerably, to meet the indefinite expense which the condition is calculated to throw upon him. It is apprehended, that, in the absence of an express stipulation to the contrary, the expense of the perusal of the assignment, both on behalf of the assignor and the vendor, must, in all cases be borne by the vendor.

assigned to attend the inheritance in the year ——, but has not been assigned or noticed on any subsequent sale or other occasion, shall be presumed to have been surrendered and merged (*b*).

CONDITIONS AS TO ASSIGNMENT AND SURRENDER OF TERMS.

(*b*) The law, with regard to presuming the surrender of terms, is, at present, very unsettled; a full statement of the points in dispute, and of the general law on the subject, will be found in 1 Sugd. V. & P. 470—510.

Presumption of surrender of terms.

The present practice of conveyancers is, never to presume the surrender of a term once assigned to attend the inheritance, from the mere absence of any dealing with or notice of the term, on subsequent dealings with the inheritance. But whether this practice will be upheld by the courts, either as between vendor and purchaser, or between adverse parties, is not clear.

Practice of conveyancers.

The only case on the point between vendor and purchaser is *Townsend* v. *Champernown*, (1 You. & Jerv. 543); in that case, a term of 1,000 years was recited in a deed, dated in the year 1758, to have been created several years before, and to have been then (afterwards?) assigned to attend the inheritance; but neither the deed creating, nor the assignment of the term were produced. The judgment of Alexander, C. B., as reported, is as follows:—"Until a different decision be pronounced, I shall, on the authority of *Doe* v. *Hilder*, (1 B. & Ald. 782), after the expiration of seventy years *without payment of interest*, presume the terms to have been surrendered."

Case of *Townsend* v. *Champernown*.

It is obvious, however, that there must be some mistake in the report; for as the term had been assigned to attend the inheritance, no question as to the payment of interest could possibly have arisen: and as, moreover, the decision was grounded on the authority of *Doe* v. *Hilder*, which is not admitted to be law, (see Sugd. V. & P. 505—508; *Doe* v. *Plowman*, 2 B. & Ad. 573), *Townsend* v. *Champernown*, cannot be regarded as a case of much authority.

On a recent purchase, a term of 500 years was noticed in a mortgage deed, dated in 1743, to have been created and assigned to attend the inheritance in 1683, and was treated as subsisting, but was not assigned. No other notice appeared of the term, though the property had been sold, and conveyed in 1802 and in 1829. The deed of 1743, would. for some time hence, necessarily appear on the title, but the deeds of 1683 were lost. Under these circumstances it was held, by a conveyancing counsel of great eminence, to whom the point was submitted by the vendor, at the suggestion of the purchaser's counsel, that a surrender of the term could not be presumed. It being, however, afterwards stated, that the ecclesiastical court would not grant a limited administration to a term, the deed creating which was lost, and the risk being evidently very trifling, the purchaser dispensed with the assignment.

Another case.

Where terms have never been assigned to attend the inheritance, and

Presumption of

CONDITIONS AS TO ASSIGNMENT AND SURRENDER OF TERMS.

III. That, as to lot ——, a term of —— years, which was satisfied in or before the year ——, but which has never since been assigned or noticed, shall be presumed to have been surrendered and merged (*c*).

IV. That, as to lot ——, a term of —— years, created in the year ——, which was never assigned to attend the inheritance, and has not been noticed since the year ——, shall be presumed to have been satisfied, and to have been surrendered and merged (*d*).

V. That all satisfied terms of years, whether already assigned to attend the inheritance or not, shall be presumed to have been surrendered and merged (*e*).

CONDITIONS AS TO IDENTITY.

CONDITIONS *as to* IDENTITY.

I. THAT, as to lot ——, the vendor shall not be required to distinguish the copyhold from the freehold part of the

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surrender of terms which have not been assigned to attend.

there is evidence or reasonable ground to presume that they have been satisfied, and they have not been noticed on subsequent dealings with the property, on which outstanding terms would usually be noticed, the practice, both of the courts and of conveyancers, is, to presume a surrender, even between vendor and purchaser. (*Emery* v. *Grocock*, 6 Mad. 54; *Ex parte Holman*, 1 Sugd. V. & P. 509).

The second condition in the text should be used, if there is a term subsisting in the property which has been assigned to attend the inheritance, and of which an assigment cannot be had.

(*c*) This condition is applicable, where a term can be proved to have been satisfied, but the ground for preserving a surrender is slight. As this condition, however, only affirms the general rule of law, it cannot often be needed.

(*d*) The fourth condition is to be used, when evidence that a term has been satisfied cannot be produced. It may be proper to notice in the condition the purpose for which the term was created, as, "by way of mortgage," or, "for raising portions," &c.

(*e*) The fifth condition is only to be employed when the terms are numerous, and the means of making out titles to them not easily to be had.

property, and the purchaser shall make no objection to the title on that account (*a*). CONDITIONS AS TO IDENTITY.

II. That, as to lot ——, the vendor shall not be required to identify the present description of the property with the description contained in documents dated thirty years ago and upwards; and the purchaser shall make no objection to the title on that account (*b*).

III. That, as the property comprised in lot —— is held by the vendor under several titles, and from the removal

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(*a*) As has been noticed in a former part of this work, (Vol. 1, pp. 78, 220), it often happens, that the freehold and copyhold, and sometimes (though more rarely) the leasehold parts of an estate become, from the change of names, the alteration of fences and landmarks, and other circumstances, so blended together, that it is impossible to distinguish them. But, as this forms a most serious obstacle to the deduction of a good title, it is usual to remedy it by means of a special condition, a precedent of which is given in the text. In some cases it may be necessary to add, Identity.

"or to distinguish of what manors the different copyholds are holden;"

and different circumstances will most likely require some variations in each particular case.

(*b*) The necessity of the occasional use of these conditions, is shewn by the remarks on evidence of identity, ante, Vol. 1, pp. 78, 220. It should be observed, that, even in the absence of stipulation, a vendor is not bound to identify the description on the court rolls of copyhold property with the present state of the property. (*Long* v. *Collier*, 4 Russ. 267).

In addition to the modes of proving identity referred to in the first volume, ubi supra, it is to be remarked, that receipts for rent, in which the property is described, (*Parry* v. *Hindle*, 2 Taunt. 180), entries written by a deceased steward, (*Barry* v. *Bebbington*, 4 T. R. 515; *Doe* d. *Strode* v. *Seaton*, 2 Ad. & Ell. 171), and other similar documents, are very valuable evidence of identity. And the declarations of a deceased occupier of land, that he held it as tenant to A. B., are evidence to prove the seisin of A. B. (*Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 16. See, too, *Crease* v. *Barrett*, 1 Cro. Mee. & Ros. 919). In using this kind of evidence, the course is this: the title deeds shew that A. B. had property in a particular place, which was in the occupation of C. D.; C. D., by a receipt for rent, or other document, is shewn to have held land of A. B. in the same place, by the modern description; and such proof is generally sufficient for a purchaser. Modes of proving.

CONDITIONS AS TO IDENTITY.

and alteration of fences and other circumstances, the respective parts held under the several titles, cannot now be distinguished, the vendor shall not be required so to distinguish them, or to identify the present with the former description of the property, and the purchaser shall make no objection to the title on that account (*c*).

CONDITIONS *as to* INCUMBRANCES.

CONDITIONS AS TO INCUMBRANCES.

I. THAT, by a settlement dated——, two rent-charges (*d*), amounting to £—— a-year, were limited to a lady for her life, payable out of large estates, of which the property comprised in the particular formed part, and a gross sum, of which £—— is now unpaid, was charged on the same estates, and a term of —— years was created for securing

(*c*) See the preceding note.

Stipulations that purchaser shall accept particular indemnities.

(*d*) A court of equity, as has been previously observed, (ante, page 33, note (*l*), will not, in general, compel a vendor to give, or a purchaser to accept an indemnity. It has, certainly, in some cases been held, that when an estate is charged with trifling incumbrances which cannot be discharged, but against which a satisfactory indemnity can be given, equity will compel a specific performance with the indemnity. (1 Sug. V. & P. 289). But this doctrine is far too uncertain in its application for a vendor to rely upon it; and if his estate be subject to jointures, annuities, gross sums, or any other incumbrances, the fact should be explicitly stated in the conditions, and coupled with a stipulation that the purchaser shall accept an indemnity against the incumbrances, and make no objection to the title on account of them. It will also be proper (as is done in the conditions in the text) to specify the indemnity which the purchaser is to accept; because, if it be one of a sufficient and satisfactory kind, the statement of it destroys the suspicions which the absence of information always inspires, and substitutes confidence in their place; and whether the indemnity offered be or be not satisfactory, the statement of it in the conditions, at any rate, prevents all dispute as to whether it is such an one as a purchaser can be called on to accept. The first four conditions in the text relate to these matters; they are intended only for examples, as it is not likely that any of them will, without alteration, suit any other circumstances than those to which they were originally adapted.

CONDITIONS AS TO INCUMBRANCES.

the rent-charges and the gross sum above referred to. The property comprised in the particular is released in equity, (though not at law), from the rent-charges; but it still remains liable to the said sum of £——. There is, however, no probability of the property comprised in the particular being resorted to, as other estates, of ample value, included in the charge, are liable to exonerate it, and the purchaser will also have the benefit of the covenant of two highly responsible persons, for indemnifying the present vendor, and all parties claiming under him, against the said sum of £——, and for procuring an assignment of the term, and a release from the proper parties, upon the death of the above-mentioned lady. The purchaser shall make no objection in respect of any of the matters mentioned or referred to in this condition.

II. That as the estates comprised in the particular are, together with other estates, which produce a clear yearly rental of £——, or thereabouts, subject to a jointure rent-charge of £——, per annum, and to a gross sum of £——, charged thereon for portions, such of the said estates, subject thereto, as are not comprised in the particular shall be henceforth exclusively subject to the said jointure and portions, and shall, before the completion of the purchases, be conveyed, (subject to the said jointure and portions, and to some other charges of small amount, now affecting the same,) to two trustees, to be named by the vendors, upon trust, to indemnify the purchasers against the jointure and portions. The purchasers shall be satisfied with the indemnity so to be provided, and shall make no objection in respect of any of the matters mentioned or referred to in this condition, and shall not be entitled to require any other evidence of the facts than the vendor is able to furnish.

III. That if a sufficient number of lots shall not be sold to pay off all the incumbrances affecting the property, and which amount to the sum of £——, or thereabouts, the vendors will undertake to satisfy, out of the lots remaining unsold, such of the incumbrances as shall not be paid off, and will execute a declaration of trust to that effect. The purchasers at the sale shall be satisfied with this decla-

CONDITIONS AS TO INCUMBRANCES.

ration, and shall not require releases from the persons whose incumbrances shall not be paid off, and shall make no objection on account of any of the matters mentioned or referred to in this condition.

IV. The property comprised in the particular, being subject, together with other estates, to a mortgage for a term of years vested in trustees for securing £—— and interest, for the benefit of parties incompetent to consent to a release from the charge, the charge was, in the year ——, released by the trustees, who were satisfied that the other estates comprised in the mortgage were of ample value to secure the mortgage money and interest. The covenant of two highly responsible persons was added, by way of indemnity, and the purchaser will be entitled to the benefit of this covenant. The purchasers shall make no objection in respect of any of the matters mentioned or referred to in this condition, and shall not be entitled to require any other evidence of the facts than the vendor is able to furnish, or any indemnity in respect of these matters, other than such as the vendor holds. Copies of the deeds by which the covenants by way of indemnity, referred to in this condition, were entered into, will be produced for inspection at the time of sale.

V. That a declaration, that for twenty years and upwards no interest has been paid upon a mortgage made twenty-nine years since by conditional surrender without admittance of the cottages and croft, which form the copyhold part of lot ——, and evidence that subsequent mortgages of the same property have since been made and paid off, shall be taken as conclusive evidence that the said mortgage has been satisfied and paid off (*b*).

Presumption of satisfaction of mortgages.

(*b*) Before the stat. 3 & 4 Will. 4, c. 27, it was the established doctrine of the courts of equity, that, even as between vendor and purchaser, the satisfaction of a mortgage debt, in respect of which there was good evidence that no demand for principal or interest had been made for a term exceeding twenty years, would be presumed, and that, under such circumstances, a reconveyance of the legal estate would also be presumed. (*Cooke* v. *Soltau*, 2 Sim. & Stu. 154; *Christophers* v. *Sparke*, 2 Jac. & Walk. 228; and the cases cited).

By the above mentioned statute, section 40, (ante, Vol. 1, p. 259), it

VI. That the purchasers shall presume that a mortgage made by indentures dated ——, and which are now in the

CONDITIONS AS TO INCUMBRANCES.

is enacted, "that, after the 31st day of December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action, suit, or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Some observations on this clause will be found ante, Vol. 1, p. 261; and in addition to the case of *Berrington* v. *Evans*, there cited, the cases of *Prior* v. *Horniblow*, 2 You. & Coll. 200, and *Phillipo* v. *Munning*, 2 My. & Cra. 309, may be consulted on the construction of the foregoing section. Of the utility of the enactment, as between claimants of money charged on land and the owners of the land, there can be little doubt; but it has not removed the difficulty which was experienced by a vendor. For, as the vendor must still satisfy the purchaser that no payment or acknowledgment has been made for twenty years in respect of any charge which he cannot prove to have been satisfied, he has still to give evidence of a negative. And as it is impossible to give conclusive evidence of a negative, the only way to prevent disputes as to what is reasonable evidence, is to specify in the conditions what evidence the vendor can furnish, and stipulate that with that the purchaser shall be satisfied. The conditions in the text do not, perhaps, stipulate for the acceptance of any evidence, except what a purchaser might be compelled to accept without special stipulation; but they serve to shew the form of such conditions. The cases of *Cooke* v. *Soltau*, and *Christophers* v. *Sparke*, ubi supra, will furnish information as to the kind of evidence which is needed, in the absence of express stipulation, for presuming the satisfaction of a mortgage.

It may be observed, that by the statute 7 Will. 4 & 1 Vict. c. 28, it is declared, that mortgagees may bring actions to recover lands within twenty years after the last payment of principal or interest. It had been considered, that the twenty years mentioned in the 2nd and 3rd sections of the 3 & 4 Will. 4, c. 27, was to be reckoned from the date of the mortgage, as the time at which the right to recover the land had accrued.

Rules of presumption between vendor and purchaser.

The rules for the presumption of surrender, satisfaction, and reconveyance of legal estates between vendor and purchaser, are thus stated by Sir John Leach, V. C.—"If the case be such, that, sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the

CONDITIONS AS TO INCUMBRANCES.

possession of the vendor, was paid off and satisfied, and that a proper reconveyance of the legal estate was made.

VII. That the purchasers shall presume the payment and satisfaction of several legacies, amounting in the whole to the sum of £——, which were charged by a will dated the —— day of ——, and proved on the —— day of ——, and were thereby directed to be paid as soon as conveniently might be after the death of the testator, but for which no receipts or releases can now be produced.

VIII. That the property was by indentures of lease and release, dated respectively the —— and —— days of ——, conveyed to the vendor by way of mortgage; but the purchaser shall accept a declaration by the vendor, that, for more than twenty years past, no interest has been paid on the said mortgage, nor the existence thereof in anywise recognised, nor any claim of redemption been made or admitted, as conclusive evidence that the mortgagor is barred by lapse of time from the right of redemption.

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fact, (i. e. the presumption), then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser." (*Emery* v. *Grocock*, 6 Mad. 54; see, too, *Hillary* v. *Waller*, 12 Ves. 239). It is not, however, very easy to say in what cases a jury would be directed to find in favour of a presumption; in the case of mortgages, payment and reconveyance will be presumed where the mortgage deeds are dated more than twenty years ago, and are in the vendor's possession; (*Cooke* v. *Soltau*, ubi supra); and of course the presumption of a reconveyance is strengthened, if a receipt for the mortgage money is indorsed on the deeds. (*Ex parte Holman*, 1 Sugd. V. & P. 509). If an estate is vested in trustees for a specific purpose, a reconveyance of the legal estate will be presumed after the expiration of twenty years from the time when the purpose was answered. (*Hillary* v. *Waller*, ubi supra, *Doe* d. *Howell* v. *Lloyd*, mentioned in Peake's Law of Evidence; *Noel* v. *Bewley*, 3 Sim. 103). But if the possession by the cestui que trusts has gone in the same channel it would have done if no conveyance by the trustees had been made, no presumption of conveyance will arise. (*Goodright* d. *Sir R. Grosvenor* v. *Swymmer*, 1 Kenyon, 385; *Keene* v. *Deardon*, 8 East, 248; *Doe* d. *Miller* v. *Brightwen*, 10 East, 583). No presumption, however, can in any case arise till after the expiration of twenty years; (*Doe* d. *Brandon* v. *Calvert*, 5 Taunt. 170); and if the case be that of an estate vested in a trustee, and the cestui que trust, choose to call for a reconveyance, the trustee cannot refuse to reconvey on the ground of a presumed previous reconveyance. (*Goodson* v. *Ellison*, 3 Russ. 583).

CONDITIONS AS TO INCUMBRANCES.

IX. That as the property is subject to a mortgage for securing the principal sum of £——, and interest at £— per cent. per annum, and legal notice has been given to the mortgagee of the intention to pay off the said principal sum if the mortgagee shall refuse to accept the said principal sum at or before the completion of the purchase, the purchaser shall take a conveyance subject to the said mortgage, and shall retain the sum of £—— out of the purchase-money to answer the same, and shall pay the interest on the said principal sum of £——, from the date of the conveyance, all interest up to that day being paid by the vendor.

CONDITIONS *as to* APPORTIONMENT *of* RENT, *on the Sale of the* REVERSION *of Property in Lease.*

CONDITIONS AS TO APPORTIONMENT OF RENT.

I. THAT, as the property comprised in lots —— and ——, is let on lease to A. B., at an entire rent of £—— per annum, the said rent shall be apportioned amongst the said lots in the following shares, (that is to say), the sum of £—— shall be the apportioned rent for lot ——, the sum of £—— for lot ——, &c., and such apportionment shall be accepted and deemed valid without the concurrence of the tenant (*a*).

(*a*) If the reversion of property which is let at an entire rent is intended to be sold in lots, or if the reversion of part only of such property is intended to be sold, the particulars or conditions of sale must state the sums into which the entire rent is to be apportioned among the purchasers of the several lots, or among the purchasers and vendor, as the case may be. It will be right, too, to add, (unless the tenant has previously assented to the apportionment), that such apportionment shall be accepted without the concurrence of the tenant, although it is tolerably clear that the statement of the intended apportionment precludes the purchaser from requiring such concurrence. (*Walter* v. *Maunde*, 1 Jac. & Walk. 181, 183). If, however, the statement in the particular is that "the apportioned rent for lot —— is £——," there is ground to contend

Necessity of apportioning rent, incident to a reversion, on a sale of the reversion in parts.

CONDITIONS AS TO APPORTIONMENT OF RENT.

II. That, as the property intended to be sold is let on lease to A. B., together with other property belonging to

that the purchaser may reasonably presume that the particular speaks of a rent already legally apportioned by a jury, or with the assent of the tenant, and may, when he finds the fact to be otherwise, refuse to complete the purchase. (*Bliss* v. *Collins*, 4 Madd. 229; S. C. 1 Jac. & Walk. 426).

Effect of apportionment on the tenant.

The tenant is not bound by any apportionment made without his consent, but may cause the rent to be apportioned anew by a jury. (*Bliss* v. *Collins*, 5 B. & Ald. 876; Bac. Abr. *Rent.* M. 3). If this should occur, and a jury should apportion the rent differently from the apportionment made in the particular, a question may arise whether, under the compensation condition, the contract can be enforced by either party on taking or giving a proper compensation, or whether the contract be wholly void, or whether it would be held binding, and be carried into effect by compelling the party, who under the new apportionment gained an increase of rent, to pay over the increase as received from time to time to the other party. Perhaps, the latter is the correct view of the case, especially if there be no compensation condition. But it is obvious that the consent of the tenant to the apportionment should, if possible, be obtained before the sale, and that when his consent has been obtained, it should be testified by his being a party to and executing the purchase deed; the additional expense may be matter of stipulation or of arrangement between the vendor and purchaser.

Powers and remedies of an assignee of the reversion of part of an estate in lease,

The assignee of the reversion of part of an estate in lease has some but not all of the rights and remedies which belong to the assignee of the reversion of the entire estate. He has the power of distress; (2 Inst. 504; Vin. Abr. *Apportionment;* 1 Jac. & Walk. 188; 1 Mee. & Wels. 758); or of bringing an action of debt or covenant for the rent, but yet so that, if the tenant have not consented to the apportionment, he can only recover such part of the rent as the jury shall, upon a just apportionment, find to be due. (Vin. Abr. *Apportionment*, E.; Bac. Abr. *Rent*, M. 3; 2 Inst. 504). He can bring actions on the lessee's covenants; (*Twynam* v. *Pickard*, 2 B. & Ald. 105); and generally has all the rights and remedies given to grantees of reversions by the stat. 32 Hen. 8, c. 34, (Evans's Statutes; Co. Lit. 215), except the benefit of conditions in their nature entire and indivisible, as a condition of re-entry. (Co. Lit. 215. a.; *Knight's case*, 5 Co. 55 b).

—his liabilities.

On the other hand, such an assignee is liable to perform the lessor's covenants, so far as relates to that part of the property, the reversion whereof he has purchased. (*Palmer* v. *Edwards*, 1 Doug. 186). All outgoings payable by the lessor must be paid by the owner of the reversion of that part of the property to which they are incident; and if there are any outgoings which are not incident to any particular part of the pro-

the vendor, at an entire rent of £—— per annum, the sum of £—— shall be apportioned as the rent to be incident to the reversion of the property intended to be sold; and such apportionment shall be accepted and deemed valid without the concurrence of the tenant (*b*).

CONDITIONS AS TO APPORTIONMENT OF RENT.

CONDITIONS *as to* INDEMNITY *against* RENT-CHARGES (*c*).

CONDITIONS AS TO INDEMNITY AGAINST RENT-CHARGES.

I. THAT a perpetual rent-charge of £—— per annum, which is payable out of the whole property offered for sale,

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perty, (as premiums on a policy of fire insurance), special arrangements must be made with respect to the apportionment of such outgoings.

The destination of the counterpart of the lease must be provided for as in the case of other title deeds; if no special stipulation be made respecting it, the purchaser will not be compelled to complete, till it is deposited in the hands of a third person for the benefit of all parties. (*Shore* v. *Collett*, Coop. 234).

See further, on the subject of apportionment, Vin. Abr. *Apport.;* Bac. Abr. *Rent*, M.; and note (*d*) infra, page 83. A precedent of a deed for apportioning rent amongst reversioners will be found in a subsequent part of this work.

(*b*) See the preceding note.

(*c*) A pernicious custom exists in many parts of the country, of selling property in fee simple subject to a perpetual ground rent or rent-charge, secured with powers of distress and entry. Such rent-charges are also occasionally created for charitable and other purposes; and, of course, they cannot be apportioned without the consent of the persons to whom they are payable; a consent, which it is almost impossible to obtain in ordinary cases, because, to give it, would diminish the security for the payment.

Origin of perpetual rent-charges.

Such rent-charges cannot be recovered in an action of debt, unless *all* the pernors of the profits of the land liable are made defendants; (*Duppa* v. *Mayo*, 4 Saund. 282); but, under the usual powers of distress and entry, the whole rent-charge may be levied upon any part of the property. Hence, when the property is sold in lots, great difficulty arises in effectually apportioning the whole rent-charge amongst the several purchasers, so as to protect each one from being compelled to pay the whole. If the rent-charge be of small amount in comparison with the value of the property, this is usually effected by stipulating, that, as between the several

Powers and remedies incident to rent-charges.

On a sale of the land, the whole rent-charge is charged in one lot—in what case, and how?

CONDITIONS AS TO INDEMNITY AGAINST RENT-CHARGES.

shall henceforth be charged exclusively on the part comprised in lot ——; and the purchaser of that lot, (or the vendor, in case the lot be not sold), shall in the usual manner indemnify the remainder of the property and the

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purchasers, the whole rent-charge shall be charged on a particular lot, and the remainder of the property indemnified at the expense of that lot. If (as in the first condition in the text) no special stipulation is made as to the manner in which this is to be effected, it seems that the proper manner is to limit to trustees, out of the property to be exclusively charged, a rent-charge of equal amount with the original rent-charge, and attended with powers of distress and entry, upon trusts for indemnifying the other lots against the original rent-charge; (*Casamajor* v. *Strode*, 2 Swanst. 347); observing, however, that the deed there stated was on appeal approved by the Lord Chancellor. (Reg. Lib. A. fol. 2, 136). But it cannot fail to be remarked, that the indemnity so provided is insufficient; for, if the purchaser of the lot to be charged should never make any one payment of the original rent-charge, and the same, with the expenses attendant upon the nonpayment thereof, should be levied upon the remainder of the property, there never will be any fund for the payment of the expenses attendant upon nonpayment of the original rent-charge. This objection is intended to be obviated by the stipulation contained in the second condition in the text; but it is not possible to meet the difficulties of the case within the limits allowed to a condition of sale; much must be left for arrangement, or in case of dispute for the decision of a court of equity.

Suggestion as to mode of indemnity.

There does not seem any good reason why the indemnity should not be made by simply giving to the trustees a power of distress and entry upon the lands to be charged, upon trust to employ the same, when necessary, for reimbursing the owners of the remainder of the property any sums they may have paid in respect of the original rent-charge, or the costs for nonpayment of the same; it is not obvious that any thing is gained by creating a new rent-charge. (See 2 Swanst. 357). Such a proceeding, however, is not usual.

If the purchasers do not exceed the number of two or three, the indemnity may be conveniently made without the intervention of trustees, by limiting separate rent-charges and powers to each separate purchaser.

Apportionment of the rent-charge among several lots.

If the rent-charge be of large amount in comparison with the value of the property, it must be apportioned among the different lots, and the different purchasers must have cross powers of distress and entry limited to them. (See note on the apportionment of rents reserved in leases, infra, page 83). Indemnity against a rent-charge is sometimes given by limiting to trustees a term in the land to be charged, but this is obviously improper, except in the case in which the indemnity is secured on incorporeal hereditaments, on which distress and entry cannot be made. A purchaser cannot, at least in ordinary cases, insist on having a term limited. (*Casamajor* v. *Strode*, 2 Swanst. 347).

owners thereof against the payment of the said rent-charge, and all expenses incidental thereto.

CONDITIONS AS TO INDEMNITY AGAINST RENT-CHARGES.

II. That a perpetual rent-charge of £—— per annum, which is payable out of the whole property offered for sale, shall henceforth be charged exclusively on the part comprised in lot ——, and the purchaser of that lot shall indemnify the remainder of the property and the owners thereof, against the payment of the said rent-charge, and all expenses incidental thereto, by covenanting with trustees for the payment thereof, and by limiting to the same trustees a rent-charge of [equal amount *or* £—— per annum], with the usual powers of distress and entry for securing the payment as well of the said new rent-charge, and all expenses incidental thereto, as of the expenses incidental to or occasioned by the non-payment of the original rent-charge; and such trustees shall be of such number as a majority in number of all the purchasers shall determine, and shall be named as to one half by the purchaser of the said lot, and as to the other half by a majority in number of the other purchasers, and with such provisions for the appointment of new trustees, and other usual provisions as a majority in number of all the purchasers shall determine; if the said —— lot, or any other lots be not sold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser or purchasers of such lot or lots.

III. The annual ground rent of £5, payable out of the property comprised in lot ——, is part of an annual rent of £20, charged on that together with other property not belonging to the vendor, but for twenty years past the said rent of £5 has been separately paid in respect of the property comprised in lot ——. This will be shewn by the production of separate receipts for the rent of £5, and the purchaser shall not be entitled to call for any other evidence that the property in lot —— is exonerated from the remainder of the rent of £20, or to call for the production of, or to investigate, or to make any objection in respect of the title to the said rents of £20 and £5, or either of them (*b*).

(*b*) It often happens, that, although an entire rent-charge has been

CONDITIONS AS TO TITHES AND COMMUTATION RENT-CHARGES.

CONDITIONS *as to* TITHES *and* COMMUTATION RENT-CHARGES.

I. THAT the purchaser of lot —— shall not be entitled to require any evidence that the lands therein comprised are tithe free, except evidence of the fact that no tithes have, for —— years past, been paid in respect thereof (*a*).

II. That the purchaser of lot —— shall not be entitled to require any evidence that the lands therein comprised are subject to the modus mentioned in the particular in lieu of tithes, except evidence that, for —— years past, such modus has been paid (*a*).

III. That, as the estate sold is charged, under the general act for the commutation of tithes, with a rent-charge of £—— per annum, the same shall be apportioned on the different lots in the sums mentioned in the particular. But such apportionment shall be made at the expense of the purchasers, in shares proportioned to the apportioned

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limited out of an estate, yet that when separate parts of that estate have become vested in different owners, distinct rents are paid by the several owners for their respective portions, and receipts taken accordingly; but no valid apportionment is ever made. A purchaser cannot be compelled to presume such an apportionment; (*Barnwell* v. *Harris*, 1 Taunt. 430); and, therefore, it becomes necessary to sell, subject to a stipulation of the nature of that in the text. Even if there be a valid apportionment subsisting, it may be proper in some cases to preclude the purchaser from examining the title to the rent-charge.

Evidence of modus and exemption from tithes.

(*a*) The act 2 & 3 Will. 4, c. 100, (ante, Vol. 1, p. 143), has greatly facilitated the operation of establishing a claim of modus, or exemption or discharge from tithes; but in some cases it may still be useful to employ stipulations, of which examples are given in the text. As to the sale of an estate tithe free, see ante, Vol. 1, p. 246; 1 Sugd. V. & P. 295. But questions of this nature will, after the course of a few years, be entirely or in great measure put an end to by the operation of the Act, 6 & 7 Will. 4, c. 71, ante, vol. 1, p. 274. See, particularly, sections 44 to 49 inclusive. See, too, the observations on this act, ante, Vol. 1, p. 315, and the Acts 7 Will. 4 & 1 Vict. c. 69, and 1 & 2 Vict. c. 64; and also the next note.

CONDITIONS AS TO TITHES AND COMMUTATION RENT-CHARGES.

sums, and the delay or neglect to make such apportionment shall not defer the completion of the purchases. If any lot or lots be not sold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser or purchasers (*b*).

(*b*) It will probably be found most convenient for land owners to have the rent-charge, for which their tithes shall be commuted, specially apportioned in manner provided by the 58th section of the 6 & 7 Will. 4, c. 71, on the several closes or portions of their lands; or to have the whole rent-charge, in pursuance of the same section, charged upon a part of their lands, and the remainder exempted. For, as long as the whole rent-charge remains charged on the entire estate of any person, it is obvious that he cannot make an advantageous sale of any part of the estate, because every part is subject to the payment of the whole rent-charge; and all the inconveniences would ensue, which have been noticed in a preceding note, with respect to common rent-charges. But the Tithe Act (sect. 72) has provided for a new apportionment of the rent-charge, whenever the land owner thinks fit to have it made; and, therefore, if an apportionment be not originally made, it can be obtained whenever a sale is contemplated. It must, however, be remembered, that the apportionment cannot be made by an equal acreable charge, unless there be a map, which has obtained the seal of the tithe commissioners. See "Form of Apportionment" of the commissioners, dated 31st July, 1837, (o. 1.)—48. Any person at present dealing with tithes should obtain a set of the forms and instructions issued by the commissioners, and which are to be had at their office.

As to apportionment of commutation rent-charges.

If an estate, charged with an entire rent-charge in lieu of the tithes, be sold in lots, without obtaining a previous apportionment among the lots, the best arrangement will probably be, to affix to the description of each lot in the particular the amount of rent-charge which it is in future to bear, and to stipulate in the conditions, that the apportionment shall be made at the expense of the purchasers, in proportionate shares, but that the completion of the purchases is not to be delayed until the apportionments are made. A precedent of such a condition is given in the text. It is obvious, however, that an apportionment ought always to be made among the intended lots, previous to the sale; and in that case, it will only be necessary to affix to the description of each lot in the particular the amount of rent-charge apportioned thereto. In some cases of sales of small value, it might be fit to preclude a purchaser from requiring evidence of the validity or regularity of an apportionment; for it is not clear, that a new apportionment, made under the 72nd section of the act, is protected by the provision in the 66th section. It is likely, that, when the commutation of tithes has become general, many fresh conditions may be required to meet the circumstances which will occur; but it would be a vain task to attempt to anticipate them. In such sales as are made

CONDITIONS AS TO LEASEHOLDS.

CONDITIONS *of* SALE *of a* LEASEHOLD *Estate in* LOTS.

Conditions I., II., III., IV., *the same as in common conditions of sale of a freehold or copyhold estate,* ante, p. 29.

V. (*a*) That no purchaser shall be entitled to call for

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during the progress of a commutation of the tithes of the property offered for sale, the fact should be stated, and such stipulations made, as the case may require,—as to whether the vendor or purchaser shall be deemed the land owner for the purposes of the act, till the sale be completed,—as to who shall bear the expenses to be incurred in the meantime,—and as to such other matters as may need adjustment.

Difficulty of the assignees of a bankrupt joining in a commutation.

It may be noticed, that a difficulty has occurred in commuting the tithes, in cases in which, at the time of attempting to make the commutation, the lands or the tithes are vested in the assignees of a bankrupt; for the act does not appear to have contemplated the case: it is difficult to say that assignees are "owners," within the meaning of sect. 12; and sect. 15 cannot well be construed to apply to the case.

Merger and extinguishment of tithes.

With respect to the merger and extinguishment of tithes in the lands out of which they issue, very important alterations have recently been introduced into the law, which will be mentioned in a subsequent note.

Lessee's obligation to produce lessor's title to a purchaser.

(*a*) There is, in every contract for the sale of a lease, (except a lease from an ecclesiastical corporation,) an implied undertaking to make out, as well the lessor's title to demise as the title of the vendor to the lease itself. (*Souter* v. *Drake*, 5 B. & Ad. 992; *Purvis* v. *Rayer*, 9 Price, 488, *ante*, Vol. 1, pp. 150, 151). But, of course, it may be matter of special stipulation, that the vendor shall not be required to make out the lessor's title; and as it is hardly ever in his power to do so, a condition to that effect should never be omitted; an auctioneer, (and à fortiori, a solicitor,) who omits such a condition, cannot recover any compensation for his services. (*Denew* v. *Daverell*, 3 Camp. 451).

As to what terms will constitute a stipulation, that a purchaser shall not be entitled to call for or object to the lessor's title, see *Spratt* v. *Jeffery*, 10 B. & C. 249; and the observations, 1 Cro. Mee. & Ros. 127, 128, which shake the authority of that case; and as to how the purchaser's right may be waived by his own conduct, see *Warren* v. *Richardson*, 1 Younge, 1.

A stipulation, that a vendor shall not be obliged to produce the lessor's

CONDITIONS AS TO LEASEHOLDS.

the production of, or to investigate, or make any objection whatever, in respect of the title of the lessor (*b*).

VI. That no purchaser shall require any other evidence of the covenants and conditions in the lease having been observed and performed up to the completion of the pur-

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title, does not preclude the purchaser from investigating that title, if he can procure the inspection of it aliunde, or from objecting to any defects in it, which he can discover. (*Shepherd* v. *Keatley*, 1 Cro. Mee. & Ros. 117; *Warren* v. *Richardson*, 1 Younge, 1). If the property comprised in the lease be of copyhold or customary tenure, the vendor must shew that the lease was authorised by the custom of the manor, or by a license from the ord; and, if by a license, he must also shew the lord's title to license. (*Hanbury* v. *Litchfield*, 2 My. & Ke. 629; *Shepherd* v. *Keatley*, ubi supra). In the latter case, however, it does not appear that the lord's title to license was called for.

If a vendor cannot produce the lessor's title, the purchaser may recover his deposit, with interest, and the expenses of investigating the title, and also any other damages which he could recover, in the case of a common defective title; (see ante, Conditions as to title, &c., note (*r*), p. 62); but he must abandon the contract; for a court of equity cannot assist him in any other way than by committing the vendor to prison.

In respect of bishops and corporation leases.

It is settled, that the purchaser of a bishop's lease cannot call for the lessor's title; (*Fane* v. *Spencer*, 2 Madd. 438; 2 Mer. 430, n.); and the same principle is applied in practice to the lease of any other corporation which demises by virtue of the disabling statutes. But the rule does not apply to a lease held under a corporation, which the disabling statutes do not affect; (*Purvis* v. *Rayer*, 9 Price, 488); although, in practice, in ordinary cases, the production of the title of any corporation is, in such cases, not required. (See ante, Vol. 1, p. 153).

Condition to be used in the sale of an underlease.

(*b*) If the term which is offered for sale be held by underlease, and that fact appear on the title, care should be taken to guard against a requisition, either for the title of the original lessor, or for the title of the lessee or assignee by whom the underlease was granted; for as the condition speaks only of the lessor's title, it may, and probably would be held, not to preclude a purchaser from requiring the production of the original lease, and the title of the grantor of the underlease. In such case, the following condition may be substituted for that in the text;—

"That the title shall commence with the underlease, under which the vendor holds, and no purchaser shall be entitled to call for the production of, or investigate, or make any objection whatever in respect of, the title of the original lessor, or the original lease, or the title of the lessor of the underlease."

CONDITIONS AS TO LEASEHOLDS.

chase, than the production of the receipt for the rent up to the —— day of —— last (*c*). The nature of the covenants in the lease may be ascertained from an abstract thereof, which will be produced at the sale.

VII. That, upon payment of the remainder of the purchase-money, at the time and place above mentioned, the several purchasers shall have proper assurances executed to them of the lots purchased by them respectively; but such assurances are to be prepared by and at the expense of the respective purchasers, and are to be tendered or left by them, on the said —— day of ——, at the office aforesaid, for execution by the vendor.

VIII. A. That, as the property comprised in the particular is held under one lease at an entire rent of £—— per annum, the said rent shall be apportioned among the

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Evidence as to the performance of covenants, &c.

(*c*) Evidence that the covenants and conditions in the lease have been observed and performed, is always required by purchasers; but as the burden which such a requisition throws upon the vendor is, in fact, that of proving a negative, viz. that no breach has been committed, it is desirable to specify the evidence which the vendor can furnish, and with which the purchaser shall be content.

As to what is notice to a purchaser of the covenants in the lease.

With regard to the nature of the covenants, and other contents of a lease, it is perfectly settled, that a person who contracts for the purchase of a lease, without any mention of its contents, is taken to have full notice of those contents, and cannot afterwards, on account of them, object to complete his purchase. (*Walter* v. *Maunde*, 1 Jac. & Walk. 181). But if the particular of sale affects to state the clauses of the lease, and states them insufficiently, or falsely, it amounts to a misrepresentation by the vendor, so as to discharge the purchaser from his contract; (*Flight* v. *Booth*, 1 Bing. N. C. 370; *Van* v. *Corpe*, 3 My. & Ke. 269); and the reading the lease at the auction by the auctioneer, is no excuse for a misdescription of the terms of the lease in the particular of sale. (*Jones* v. *Edney*, 3 Camp. 285; *Flight* v. *Booth*, ubi supra). It is obvious, therefore, that the particular of sale should either state the terms of the lease with accuracy, or should not state them at all; and should never be content with merely describing the covenants as usual covenants, unless they are undoubtedly of that class. (See *Propert* v. *Parker*, 3 Russ. & My. 280). It seems, that a person who contracts for an underlease, will be held to have constructive notice of at least all the usual covenants of the original lease; (*Van* v. *Corpe*, ubi supra; *Flight* v. *Barton*, 3 My. & Ke. 282); and, perhaps, of all covenants, whether usual or unusual; (*Cosser* v. *Collinge*, 3 My. & Ke. 283).

CONDITIONS AS TO LEASEHOLDS.

several lots in the shares mentioned in the particular, and the several purchasers shall, at their own expense, give and execute such mutual indemnities, with regard to the payment of the said apportioned rents, and the observance and performance of the covenants and conditions relating to the lots purchased by them respectively, as are usual in like cases (*d*).

Apportionment of rents and liabilities, on a sale of leaseholds in lots.

(*d*) At common law, no apportionment of services could be effected except by the act of law, even when the tenancy was in fee; and—the services issuing out of each and every part of the land,—the lord might distrain on any part for the whole. The statute of Quia emptores provides that, in cases of alienation in fee simple, the services shall be apportioned; and hence it is, that, at the present day, rent services are apportionable either by the verdict of a jury, or the consent of the tenant, in manner mentioned in a previous note. (Note (*a*), p. 73). But as the statute of Quia emptores makes no mention either of terms of years, or of rent-charges, or of rents seck, the original common law remains, with regard to them, unaltered. And hence it is, that the great difficulty arises in effecting a sale in lots of any property which is held for a term of years under one lease at an entire rent for the whole; for, after an assignment of any part of the property to a purchaser, the lessor may distrain upon that part for the rent which accrues due on the whole property included in the lease; the avowry is made for the rent due from the original tenant in the original demise, and nothing appears upon the record as to the assignment. (1 Bing. N. C. 760). For the reasons above noticed, there is no mode of compelling an apportionment, and the consent of the lessor to an apportionment can hardly ever be obtained. The same difficulty occurs in case of a sale in lots of land subject to a rent-charge; each parcel of the land remains subject to the whole rent. In case the lessor or owner of the rent-charge is willing to make an apportionment, the object may be effected by a covenant on his part to levy the apportioned parts of the rent only on those parcels of the land out of which it is intended they shall thenceforward respectively issue.

The condition of re-entry, usually inserted in leases, is another formidable obstacle to effecting sales in lots of the property, because, if the assignee of any one part neglects to pay the rent or perform the covenants as to that part, the lessor may re-enter on the whole property comprised in the lease, and avoid the lease as to the whole. (*Walter* v. *Maunde*, 1 Jac. & Walk. 181). Of course, the effect of that proviso is to render the assignee of each part liable to be evicted by the acts of persons over whom he has no control.

Liabilities and rights of an assignee of part of the estate in lease.

An original lessee, notwithstanding his having assigned any part or the whole of the demised property, always remains liable to the payment of the whole rent, and to the observance of the covenants, by reason of his

CONDITIONS AS TO LEASEHOLDS.

VIII. B. (*e*) That, as the property offered for sale is held under one lease at an entire rent of £—— per annum,

privity of contract. (*Rushden's case*, Dyer, 4 *b*; *Broom* v. *Hare*, Cro. Eliz. 633). An assignee of part of the property is liable, by reason of his privity of estate, for the observance of the covenants which run with the land, so far as they relate to the part of which he is assignee; (*Congham* v. *King*, Cro. Car. 222; see, too, *Stevenson* v. *Lambard*, 2 East, 576); and he is entitled to the benefit of all such of the lessor's covenants as run with the land, and relate to the part of which he is the assignee. (*Palmer* v. *Edwards*, 1 Doug. 186). Of course, the privity of an assignee of part of the property, like the privity of an assignee of the whole, is destroyed by his assignment of the estate. It is, at present, an unsettled question, whether an assignee of part of the land is liable in an action of debt or covenant for the whole rent; (*Hare* v. *Cater*, Coop. 766; *Curtis* v. *Spitty*, 1 Bing. N.C. 756); but as he is liable to be distrained upon for the whole, it is clear, that, practically, rent cannot be apportioned by the alienation of the lessee.

Mutual indemnities of the assignees of different parts of property held under one lease.

It follows, from the preceding considerations, that when property comprised in one lease and demised at an entire rent, is to be sold in lots, it becomes needful to provide each purchaser with a security that each of the other purchasers shall pay a stipulated part of the rent, and observe the covenants relating to his respective share; and to accomplish this effectually, is a matter of great difficulty. Perhaps, the best way is, for the purchaser of a particular lot, or of the largest part in value, to take an assignment of the original lease, and make under-leases to the other purchasers of their respective portions; or for the vendor to retain the term himself, or assign it to trustees, and for all the purchasers to accept under-leases of their respective portions. In such cases, the under-lessees should execute counterparts of their under-leases, and the under-leases should contain proper covenants for indemnifying the holder of the original lease and the several under-lessees, against the acts of all other parties except themselves. Sometimes cross powers of distress

Modes of indemnity and apportionment.

(*e*) Perhaps, it may frequently be deemed sufficient to stipulate that the purchaser or all the purchasers but one, shall take under-leases as mentioned in the Conditions numbered VIII. B, and VIII. C, respectively, such under-leases to contain the same covenants and conditions as the original lease, and the under-lessees to have merely a covenant for quiet enjoyment from the person in whom the original lease is vested. If there be a covenant on the part of the lessee in the original lease, to insure against fire, in a given sum, it seems necessary to resort to the method of under-leases, because the original lessor has a right to have the whole property included in one insurance in one sum, and not to have each part of it insured in a smaller sum.

CONDITIONS AS TO LEASEHOLDS.

the said rent shall be apportioned among the several lots in the shares mentioned in the particular. The purchaser of the largest part in value shall take an assignment of the existing lease, and shall execute to the other purchasers under-leases, for the whole term wanting three days, of their respective lots, at the said apportioned rents, such under-leases to contain all necessary covenants for indemnifying the several purchasers against the performance of the covenants or payment of the rent in respect of any other lots than their own, and for securing the payment of the rent and performance of the covenants by the several purchasers in respect of their own lots; if any lots remain unsold, the vendor shall, for the purposes of this condition, stand in the place of the purchaser of the largest part in value. All the under-lessees shall execute counterparts of their leases, and all instruments required by this condition, shall be prepared by and at the expense of the respective purchasers.

VIII. c. (*f*) That, as the property offered for sale is held under one lease at an entire rent of £—— per annum, the vendor will execute under-leases to the several purchasers of the lot or lots purchased by them respectively, for the whole of the original term wanting three days, and at the rents apportioned in the particular to the several

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and entry are given to the several purchasers over each others' lots, and other kinds of indemnity are employed, which will be mentioned in that part of the work which treats of indemnity deeds. If the lessor can be induced to concur in the sale, the lease should be surrendered, and new and separate leases granted of their respective lots to the separate purchasers; and if the lessor be an ecclesiastical corporation, so that there can be no ground to doubt the lessor's title, this mode is free from objection.

Some precedents of conditions, adapted to the sale of a leasehold estate in lots, are given in the text; and they might, if such a course had been deemed useful, have been greatly multiplied; these, however, which are furnished, are sufficient to form precedents by which such others as are needed may be framed. It is impossible, within the limits of a condition of sale, to make with accuracy the precise stipulations which are required, and, therefore, perhaps, the Condition numbered VIII. A, is the most likely to be practically useful. It leaves open the questions, however, what indemnities are "usual in like cases."

Observations on the form in the text.

(*f*) See note (*e*), p. 84.

CONDITIONS AS TO LEASEHOLDS.

lots. The under-leases shall contain all necessary covenants for indemnifyiug the several purchasers against the payment of the rent or performance of the covenants, in respect of any other lots than their own, and for securing the payment of the rent and performance of the covenants by the several purchasers in respect of their own lots. All the under-lessees shall execute counterparts of their leases, and all instruments required by this condition shall be prepared by and at the expense of the respective purchasers.

IX. That the purchaser of the largest part in value shall, after the sale of all the lots, be entitled to the custody of the lease, and such other of the muniments of title as are in the vendor's possession; but such purchaser shall enter into the usual covenants with the purchasers of the remainder of the said lots for the production of the said lease and muniments: if any lots shall remain unsold, the vendor shall retain the said lease and muniments, and enter into the usual covenants for their production with the purchasers of such lots as shall have been sold; such covenants, nevertheless, to be determinable on the vendor's parting with the said muniments, and procuring the person to whom they shall be delivered to enter into the usual covenant for their production with the persons then entitled to the benefit of the vendor's covenants. All such covenants, both original and substituted, shall be prepared by and at the expense of the covenantees (*g*).

X. That each purchaser shall, on the completion of the purchase, execute to the vendor a bond, in the sum of £——, for indemnifying him against the rents and covenants of the lease, so far as relates to the part of the property purchased by such purchaser; such bonds to be prepared by the vendor at the expense of the respective purchasers (*h*).

(*g*) Variations in the form of the condition given in the text will be found among the precedents of conditions relating to title deeds, with remarks on their application to different circumstances. They can be easily adapted to the case of leasehold property.

Obligation of assignee to in

(*h*) This condition is not strictly necessary, because, independently of special stipulation, the assignor of a lease, whether he is the original

XI. and XII. *the same as Conditions* VI. *and* VII. *of the Common Conditions of Sale of Freehold or Copyhold Estate*, ante, pp. 32—36. CONDITIONS AS TO LEASEHOLDS.

SPECIAL CONDITIONS *as to the* SALE *of* LEASEHOLDS. CONDITIONS AS TO LEASEHOLDS.

I. THAT the title shall commence with ——, dated ——, and no purchaser shall be entitled to call for the production of the original lease, or of any mesne assignments thereof, as the same are not now known to be in existence (*a*).

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lessee or not, is entitled to a covenant from the assignee for indemnity against the payment of the rent and the performance of the covenants; (*Pember* v. *Matthew*, 1 Bro. C. C. 52; *Staines* v. *Morris*, 1 Ves. & Bea. 8); and that, too, even when the assignee gets no covenants for title. (*Ib*). The principal object of the condition is, to provide that the indemnity shall be given by bond, instead of being given by a covenant in the indenture of assignment, which does not remain in the possession of the vendor; and the condition also throws the cost of the bond on the purchaser. Indemnify assignor of a lease against rent and covenants.

The assignees of a bankrupt leaseholder are not entitled to an indemnity against the rent and covenants, and ought not to stipulate for it. (*Wilkins* v. *Fry*, 1 Mer. 244; see, too, stat. 6 Geo. 4, c. 16, s. 75).

(*a*) This condition is intended to be used upon the sale of a long term of years, of ancient creation, and of which the deed of grant is lost. (See ante, Vol. 1, p. 151; 1 Sugd. V. & P. 338). If the deed creating the term be in the possession of the vendor, the condition should be altered to the form following:— Stipulations on the sale of a term of ancient date.

"that the deed creating the term shall be produced, but the purchaser shall not be entitled to call for the production of, or to investigate, or to make any objection in respect of, the mesne assignments of the term or the title thereto, prior to an indenture, dated the —— day of ——, with which the title is to commence."

In cases of this kind, it will be prudent to preclude the purchaser from calling for the lessor's title, although, probably, the want of it would not be considered a valid objection to the title; certainly, it never would be called for, unless with a view to the rejection of the purchase.

CONDITIONS AS TO LEASEHOLDS.

II. That no purchaser shall be entitled to call for the production, or make any objection in respect of the lease or leases which have been surrendered, prior to the grant of the subsisting lease (*b*).

III. That the ages of the several persons, for whose lives the property comprised in lots —— and ——, is now held on lease, are believed to be accurately stated; but the purchasers of these lots shall not require any evidence of the ages of these persons, except such as is in the vendor's possession, and shall make no objection on account of any inaccuracy in the statement of those ages (*c*).

(*b*) This condition applies to sales of renewable leaseholds, and is, in such cases, essential. (See ante, Vol. 1, p. 154; 1 Sugd. V. & P. 338).

Stipulations against shewing the equitable title to surrendered leases.

But the form in the text is not adapted to the purpose of precluding a purchaser from requiring the equitable title to the surrendered leases, which, of course, attaches on the existing lease. In ordinary cases it is unnecessary, and would be very unfair to stipulate, that the purchasers shall not see the equitable title to the surrendered leases, because such a stipulation amounts to a condition, that the purchasers shall have no title at all. If, however, circumstances require such a condition, the vendor should state his intention in clear terms; he may effect this by subjoining to the condition in the text,

"or to call for the production of, or to investigate, or make any objection in respect of, the legal or equitable title, prior to the date of the subsisting lease."

Or he may stipulate expressly, that the title shall commence with the subsisting lease, and that the purchaser shall have no right to investigate the prior title, either legal or equitable.

Evidence of ages of cestui que vies.

(*c*) In the absence of special stipulation to the contrary, a purchaser is entitled to require evidence, that the ages of the cestui que vies shall be proved by extracts from the registers of their baptisms or births, or by other satisfactory evidence; and if such evidence can be procured, it is obvious, that recourse should never be had to any stipulation which precludes the purchaser from getting what he is fairly entitled to, and will reasonably expect. If, however, the vendor be unable to give strict proof of the ages of the cestui que vies, he must protect himself by a condition, and if the ages of the cestui que vies be stated in the lease, the form in the text, numbered (IV.) will be the one which, in all probability, will be the least alarming to a purchaser. It must be remembered, that if, after an agreement for a sale of an estate, holden for lives, one or more of the lives should drop before the completion of the purchase, the loss will fall on the purchaser. (*White* v. *Nutt*, 1 P. Wms. 60; 1 Sugd. V. & P.

Case where a cestui que vie dies after the sale, before the completion of the purchase.

CONDITIONS AS TO LEASEHOLDS.

IV. That the ages of the several persons, for whose lives the property comprised in lots —— and —— are now held on lease, are stated in the particular according to the statement of the ages in the lease, and such statement in the lease shall be taken by the purchasers as conclusive evidence of the ages of such persons (*d*).

CONDITIONS *of Sale of* REVERSIONARY INTERESTS, LIFE INTERESTS, *and* POLICIES *of* ASSURANCE (*e*).

CONDITIONS AS TO REVERSIONS, &c.

ch. 5, sect. 2; see, too, *Mead* v. *Davison*, 3 Ad. & Ell, 303; *Bacon* v. *Simpson*, 3 Mee. & Wel. 78; see, however, infra, tit. AGREEMENTS, Precedent IV., notes. But if a life had dropped before the agreement for sale, and the purchaser were not informed of the fact, undoubtedly the sale would be void. And where, in the particulars of sale, property was stated to be held on three lives, and one of the lives had dropped before the sale, it was held, in an action for the deposit, that the auctioneer could not be called to prove that he had stated before the sale, that the life had dropped. (*Bradshaw* v. *Bennett*, 5 Car. & Páy. 48). This is in accordance with the well-known doctrine, that the auctioneer cannot vary the printed or written particulars by verbal declarations. (1 Sugd. V. & P. 31; see, however, *Bartlett* v. *Purnell*, 4 Ad. & Ell. 792).

(*d*) See the preceding note.

Observations on sales of reversions, life interests, &c.

(*e*) The conditions to be employed in sales of property of this description, do not materially differ from the common conditions, of which the forms have been previously given. The word "assignment" should be substituted for "conveyance," and such other alterations made as the different nature of the property requires. Conditions, as to the evidence of the ages of the persons interested in the property, or on whose lives the insurances may have been effected, must be used, if legal proof cannot be had; the forms given, with regard to the ages of the cestui que vies of leases will furnish precedents of such condition. (See, ante, *Special Conditions as to Leaseholds*, CONDITIONS III. *and* IV.). If the property sold yield no annual profit, as in the case of a reversion or a policy of assurance, the stipulation, that the purchaser, if the purchase be not completed on the day fixed, shall pay interest on his purchase-money from that day, should invariably be inserted in the conditions. If the property be a life interest in possession, the time from which the purchaser is to take the profits should be fixed; if no time be fixed, he will be entitled to the

CONDITIONS AS TO REVERSIONS, &c.

profits from the time of the sale. (*Anson* v. *Towgood*, 1 Jac. & Walk. 637; see, too, *Twigg* v. *Fifield*, 13 Ves. 517). It has been decided, that a court of equity will decree a specific performance of a contract for sale of a life annuity, though the annuitant be dead at the time of the decree. (*Kenney* v. *Wexham*, 6 Madd. 355).

Description of property in particular.

The point principally to be attended to, in preparing particulars and conditions of sale of property of the nature above-mentioned is, that the interest offered for sale is accurately described. There is little difficulty in the case of a simple policy of assurance on a life, or a life interest in possession, or an absolute vested reversion; but it is an operation of the greatest nicety and difficulty to frame a description which may be comprised within the ordinary limits of a particular, and shall, at the same time, accurately and clearly define an interest contingent or presumptive, and liable to variation on many different events. The task is, in fact, that of attempting to state in a few words, the effect of long and complicated clauses, and frequently, as might be expected, is unsuccessful. The safest way in such cases is, to state generally the nature of the interest, and to produce, before or at the sale, a copy of the instrument under which the interest is held, in such a manner as to give a purchaser notice of the contents. If, however, the particular be unfair or fraudulent, a notice that the instrument, under which the interest sold is held, may be seen at a given place, and will be produced at the sale, does not necessarily impose an obligation on a purchaser to refer to that instrument; (*Dykes* v. *Blake*, 4 Bing. N. C. 463, 476); and, therefore, care should always be taken, that the particular, even if it do not contain a complete description, is free from any thing likely to mislead a purchaser. If the interest sold, be subject to the payment of legacy duty, or to any other deduction, of course the particular should disclose that fact.

In a recent case, Gilman Lucas being entitled to a contingent reversionary interest in an equal moiety of a sum of 2,000*l.*, part of a larger sum then invested in the funds, advertised it for sale by auction, as a reversion to 1,000*l.*, principal money, part of a sum of 20,000*l.*, principal money, invested in the 3 per cent. consols, and assigned it to Bond, the purchaser at the sale, by the description of "all that sum of 1,000*l.* sterling, being one moiety of the said legacy or sum of 2,000*l.*;" under these circumstances it was held, that Bond was entitled to the surplus value which a proper share of the consols produced on the sale, and not merely to a sum of 1,000*l.* sterling. (*Lucas* v. *Bond*, 2 Keen, 136).

Sales of policies of assurance.

In respect to sales of policies of assurance on lives, the vendor should be prepared to prove that the person, on whose life the assurance is made, was in a good state of health when the policy was effected, and of the age mentioned in the policy, and that nothing has been done to vitiate the policy. The vendor may, of course, protect himself from such requisitions by special conditions of sale, but unless he use great caution in the matter, he will probably render his property unsaleable. On a sale by auction of a life interest, the life was described in the particular as that of a healthy gentleman, whose life was insurable, and an insurance

CONDITIONS AS TO REVERSIONS, &c.

was guaranteed at five guineas per cent.; it appeared that the vendor had, shortly before the sale, insured the life at a rate less than five guineas, but considerably higher than that paid for a healthy life. Under these circumstances, a bill for a specific performance against the purchaser, was dismissed with costs, on the ground of the misrepresentation by the vendors. (*Brealey* v. *Collins*, 1 You. 317).

If the policy offered for sale be of an assurance not on the life of the assured, but on that of some other party, the vendor should be ready with evidence, that the person who effected the assurance, had an assurable interest, within the meaning of the statute 14 Geo. 3, c. 48, in the life of the assured, and that such interest is subsisting at the time of the sale. It has, however, been held at Nisi Prius, that although, on a sale by auction of a policy of this nature, the particular did not mention that the vendor had only a redeemable interest in the life of the party assured, and the interest was afterwards redeemed, still the sale was valid, inasmuch as it appeared that it was the practice of the assurance office to pay the sums secured by such policies, without inquiring into the continuance of the interest. (*Barber* v. *Morris*, 1 Moo. & Rob. 62). There were, however, some special circumstances in the case; and it is doubtful whether the decision can be relied on as an authority in similar cases. In a recent case, A. insured his own life, and eight years afterwards assigned the policy to B. for a nominal consideration; the policy was then sold under a decree in a suit against the executors of B., and was assigned to C., the purchaser. On a sale by the executors of C., the intended purchaser objected that the policy, after the first assignment, became void for want of interest in the assignee; but it was held by the Court, that the case was not within the meaning of the above statute, and that the purchaser was entitled to bring an action on the policy in the name of the assured. (*Ashley* v. *Ashley*, 3 Sim. 149). But if a creditor insures his debtor's life, and the debt is afterwards paid by the executors of the debtor, the creditor cannot recover against the assurers. (*Godsall* v. *Boldero*, 9 East, 72).

It has been decided, that the interest required by the statute is a pecuniary interest, and that the consideration of blood, (as in the case of a policy effected by a father on the life of his son), is not sufficient. (*Halford* v. *Kymer*, 10 B. & C. 724). A policy on a person's own life is, in all cases, vitiated by his execution for felony. (*Amicable Society* v. *Bolland*, 4 Bligh, N. S. 104; S. C. 2 Dow & Clark, 1).

CONDITIONS OF SALE UNDER A DECREE.

CONDITIONS *of* SALE *under a* DECREE *of the* COURT *of* CHANCERY.

CONDITIONS I. and II. *See Common Conditions of Sale of Freehold or Copyhold Estate, page 29 (a).*

III. That every purchaser shall, on or before the —— day of ——, pay into the Bank of England, with the privity of the Accountant-General of the Court of Chancery, to be placed to the credit of the cause, A. B. v. C. D., the amount (*b*) of his purchase-money; [and also the sum of

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Sales under a decree of a court of equity.

(*a*) The first of these conditions is usually omitted on sales under a decree, as the mode of sale is prescribed by the practice of the court; (1 Sugd. V. & P. 56); and the highest bidder is not the purchaser till he is reported to be so by the Master. Ample information with regard to the proceedings on such sales will be found in 1 Sugd. V. & P. ch. 2. It may be observed, in addition to the statements there made, that if an estate be insolvent, and it be desirable to avoid the expense of sending the Master's clerk into the country, a sale may be made by an auctioneer in the country to be approved by the Master. (*Thompson* v. *Hodgson*, 2 You. & Col. 311). And it seems, that although, if a purchaser re-sell at a profit before his purchase is confirmed, the estate and not the purchaser is entitled to such profit; (1 Sugd. V. & P. 57; *Hodder* v. *Ruffin*, 1 Tamlyn, 341); yet that this rule does not apply to a purchase from a purchaser from the assignees of a bankrupt. (*Ex parte Anderdon*, 1 Dea. 585).

Peculiarities of conditions of sale under a decree.

(*b*) A sale before a Master is not within the statute of frauds; (*Attorney-General* v. *Day*, 1 Ves. 218); but the bidders are required to sign the particular. (See 1 Sugd. V. & P. 56). It is very usual to dispense with the payment of a deposit on sales which are made under the decree of a Court of Equity; probably from the facilities which exist in such cases for compelling purchasers to complete their purchases. (See 1 Sugd. V. & P. 60). However, there is no objection to stipulating for the payment of a deposit, if the owners prefer such a course; and in that case the payment of the deposit and the investment of it will be governed by the same rules as in other cases; (1 Sugd. V. & P. 57); and the previous forms of conditions relating to the deposit will be applicable. The conditions in the text must then be made to

money at which the timber, and timber-like trees, pollards, and saplings, standing upon the lot or lots purchased by him, shall be valued, according to Condition ——] (*c*); together with interest, after the rate of £4 per cent. per annum, upon such amount [and sum respectively], from the 29th day of September, 1837, up to the day on which the same [respectively] shall be so paid in; and every purchaser shall be entitled to the possession of his lot, or to the receipt of the rents and profits thereof, from the said 29th day of September, up to which time all outgoings will be cleared by the vendor. If, from any cause whatever, such purchase-money, [or the value of such timber and trees,] shall not be so paid in on the said —— day of ——, the purchaser shall pay interest thereon, [respectively,] at the rate aforesaid, from the said 29th day of September up to the day of payment (*d*).

CONDITIONS OF SALE UNDER A DECREE.

IV. That, within —— days from the day of the sale, the owners of the estate shall, at their own expense, deliver to every purchaser, or his solicitor, an abstract of the title of the owners to the lot or lots so purchased by him respectively.

V. That upon payment of the purchase-money, and the

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speak of the remainder instead of the whole amount of the purchase-money.

(*c*) The words in brackets will, of course, be omitted, if inapplicable; or will, (if need be), be altered to meet the case of fixtures or other things which are to be taken at a valuation.

(*d*) A purchaser under a decree is entitled to be let into possession of the estate from the quarter-day preceding his purchase, paying his money before the following quarter-day, except in the case of a colliery or other trade in which the profits are settled at different intervals. (1 Sugd. V. & P. 61).

Costs of investigating title, &c. if bad.

If the title prove bad, the purchaser will be entitled to have the costs of and consequent upon his having become purchaser, and of the reference, and of investigating the title, paid out of the fund in court, if there be one; (*Reynolds* v. *Blake*, 2 Sim. & Stu. 117; *Att.-Gen.* v. *Corporation of Newark*, 8 Sim. 71); and if there be no fund in court by the plaintiff in the suit. (*Smith* v. *Nelson*, 2 Sim. & Stu. 557; *Berry* v. *Johnson*, 2 You. & Col. 564).

CONDITIONS OF SALE UNDER A DECREE.

value of the timber and trees, as aforesaid, at the time and in manner above mentioned, all necessary parties shall execute proper conveyances to the respective purchasers of the several lots purchased by them respectively; but such conveyances are to be prepared by and at the expense of the respective purchasers; and are to be tendered or left by them on the said —— day of ——, at the office of the said Master, for execution by the necessary parties.

VI. That the purchaser of the largest part in value of any lots held partially or wholly under the same title, shall, after the sale of all the said lots, be entitled to the custody of such of the muniments of title relating thereto, as are in the possession of the owners of the estate; but such purchaser shall enter into the usual covenants with the purchasers of the remainder of the said lots, for the production and furnishing copies of the said muniments, such covenants to be prepared by and at the expense of the covenantees; until the whole of the said lots shall be sold, the said muniments shall remain in the office of the said Master.

VII. That if any mistake be made in the description of the property, or any other error whatever shall appear in the particulars of sale, such mistake or error, (if capable of compensation), shall not annul the sale, but a compensation, to be settled by the Master, shall be allowed or given by the owners or the purchaser, as the case may require.

VIII. That if any of the purchasers shall neglect or fail to comply with the above conditions, the lots purchased by the person so neglecting or failing, shall (if the said Master shall think fit,) be resold, either by public auction or private contract, at such time and place, subject to such conditions, and in such manner in every respect, as the said Master shall deem meet; and the deficiency in price, (if any), which shall happen on such second sale, and all expenses attending the same, shall, immediately after the same, be made good and paid in manner mentioned in the third condition, by the defaulter at this present sale; and in case of nonpayment, the whole, or such part of the same as shall not be paid, shall be recoverable as and for liquidated damages.

CONDITIONS *of* SALE *by* TRUSTEES, MORTGAGEES, *and* ASSIGNEES (*a*).

CONDITIONS OF SALE BY TRUSTEES.

THAT, as the vendors are [trustees, &c., *as the case may be*], the purchaser shall not be entitled to any other cove-

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(*a*) The law with regard to sales by assignees of a bankrupt, will be found stated in Arch. Bank. Law, p. 223. (See, too, the cases of *Ex parte Bradstock*, 1 Dea. 272; *Ex parte Alexander*, 1 Dea. 273; *Ex parte Brown*, 2 Dea. 479). The manner in which the property of an insolvent is to be sold, is prescribed in the late statute, 1 & 2 Vict. c. 110, s. 47.

Sales by assignees.

If the vendors are trustees or mortgagees with a power of sale, or assignees of a bankrupt or insolvent, or sell in any other capacity than that of persons entitled to the whole beneficial interest, the fact should be stated in the conditions of sale, with a notification that the purchasers are not to have the ordinary covenants for title. It is probable, however, that, even in the absence of such a condition, the purchaser could not refuse to complete his purchase on the ground that he could not have proper covenants for title; (see ante, page 32, n. (*k*); but it is best to prevent any dispute on the matter. The other necessary conditions will be taken from the preceding forms.

As to covenants for title on sales by trustees, &c.

It must be observed, however, that trustees and the like are not at liberty to sell subject to any conditions of sale they may choose; they must be prepared to shew both to the purchasers and to their own cestui que trusts, that every stipulation inserted in the conditions is justified by the circumstances of the case, (that is to say), that every stipulation is intended to guard against a particular defect in the title, or in the property, which defect they have ascertained to exist, and have no reasonable means of remedying. For instance, it is obviously a breach of trust, for trustees to stipulate on a sale, that recitals in deeds twenty years old shall be conclusive evidence of the facts recited, if proper evidence of those facts can be procured at a small expense of money and trouble. So it is likewise a breach of trust to stipulate that the title shall commence at a period less than sixty years before the date of the sale, if the earlier muniments are in the possession of the vendors, or could be produced by reasonable diligence. So, also, it is a breach of trust to stipulate that any indefinite expenses of making out the title or otherwise, which ought to be borne by the vendor, shall be paid by the purchaser. And the reason why these

Power of trustees, &c. to sell, subject to special conditions.

CONDITIONS OF SALE BY TRUSTEES, &c.

nants, except several covenants by the vendors, that they have not incumbered the property.

and the like stipulations are breaches of trust is clear, viz. that no trustee or agent having money to lay out in the purchase of land, no person who is advised by his lawyer, and, in short, no prudent person sufficiently informed as to the effect of such conditions, would venture to purchase subject to them; for the effect of them is that a purchaser shall have only an insufficient title, or no title at all, or that he must make it out at his own expense. But if a numerous class of persons is deterred from bidding at a sale by the use of such conditions, and competition, consequently, is diminished, it is manifest that a less price will be got for the property than might have been obtained at a fair sale; and trustees are not warranted in speculating on the contingency, that the expense the conditions save will more than make up the deficiency of price those conditions occasion. To sell subject to conditions of the foregoing nature, is, in fact, to speculate on the ignorance and heedlessness of purchasers, and it is the duty of trustees not to enter into speculations, but to make out the best title that can be made out by reasonable diligence, and at a reasonable cost, and then, if necessary, by appropriate conditions of sale, to guard against the defects which they cannot remedy.

Trustees should also take care that they do not incumber their sales by conditions for the purchase of fixtures belonging to a tenant for life, or any conditions of a like nature; for as such stipulations obviously tend to diminish the sums to be bid for the corpus of the estate, they are in the same proportion injurious to the interests of the cestui que trusts, and, consequently, amount to a breach of trust in the trustees.

In order to avoid disputes as to the stipulations which trustees are authorized to enter into, it has become usual to insert in all trusts and powers of sale, a declaration that the trustees, or the donees of the power, may make such special stipulations as to title or otherwise, as they may deem fit. But it must be understood that the license so given does not authorize the employment of unnecessary or extravagant conditions, but merely enables the trustees to make such stipulations as an absolute owner of common understanding would in like cases make. And the practice that has arisen of authorizing trustees to use special stipulations, although it proves the opinion of conveyancers to be, that the use of such stipulations may be, in some cases, beneficial to the estate, yet it would not, in all probability, be taken to prove that the power, being beneficial, is, therefore, necessarily incident to the office of a trustee. For in the familiar and parallel case of giving trustees a power to buy in premises upon a sale by auction, (which is now invariably done), it has never been held that, because the power is extremely useful, therefore trustees are necessarily entitled to it by virtue of their office.

When a purchaser objects that a sale is invalid because the vendors, being mere trustees or persons in part only beneficially entitled, have

CONDITIONS OF SALE BY TRUSTEES, &c.

sold subject to improper conditions, the vendor's answer usually is, that when the purchaser entered into the contract, he knew that the vendors were trustees, and cannot, therefore, be afterwards heard to allege that they had no right as trustees to enter into such a contract. But the vendors, to avail themselves of this reply, must have given clear notice of the character in which they sell, and even then the answer is not conclusive; for the purchaser is entitled to argue that, when he saw the conditions, he had a right to presume, till by a perusal of the abstract he learned the contrary, that the vendors had a special power to make such stipulations, or that they were absolutely required by the state of the title; and that, at all events, a court of equity will never compel him to complete a breach of trust, merely because he has already commenced it. If a sale, subject to special stipulations, be a breach of trust, it is quite clear that a specific performance would never be decreed against a purchaser, because he had notice of the character of the vendors, when he entered into the contract; (*Mortlock* v. *Buller*, 10 Ves. 292; *Brian* v. *Acton*, 5 Vin. Abr. 533, pl. 33; *Stratford* v. *Lord Aldborough*, 1 Ridg. P. C. 281); but whether the purchaser could recover his deposit in an action at law, is a more doubtful question. The point discussed in the preceding note has been mentioned but not decided in *Robinson* v. *Musgrove*, 2 Moo. & Rob. 92; see, too, the observations of Sir W. Grant, M. R. 1 Mer. 268.

On the principles above stated, it follows à fortiori that a mortgagee who settles or incumbers the mortgage debt, and then exercises a power of sale, but clogs the sale with special and unusual stipulations relating to his own settlements and incumbrances, cannot make a good title to a purchaser, for, otherwise, the equity of redemption might be rendered of no value by the acts of the mortgagee himself.

The title to be required by trustees purchasing.

In connexion with the foregoing subject it may be observed, that trustees who have money to lay out in the purchase of land, are bound to require such a title as a court of equity would compel them to accept, and would aid them in forcing upon any person who contracted to purchase from them without any special conditions of sale. Of course, therefore, as has been before observed, trustees cannot purchase subject to special conditions as to title; and it is equally contrary to their duty to purchase subject to any condition which throws upon them any part of the expense usually borne by the vendor, or subject to a condition limiting the time within which they are to make their objections to title, or subject to any other condition which is not usual. If trustees enter into a contract subject to improper stipulations, perhaps a court of equity would not assist the vendor, by compelling them to specifically perform their contract, but would leave him to his remedy at law. If, however, they should complete a purchase, with a title not marketable except under special conditions, doubtless, the cestui que trusts may repudiate the purchase, and compel the trustees to make good the monies expended by them.

AGREEMENTS.

GENERAL OBSERVATIONS.

THERE is very little variety in the formal parts, and infinite diversity in the essential stipulations of Agreements; and, therefore, forms and precedents are of less use in the preparation of those than of any other instruments. Hence, the number of Precedents of Agreements is, in this collection, intentionally small; and the draftsman, having once made himself acquainted with the usual shape of an agreement, must prepare such as come before him from a consideration of the peculiar circumstances of each case, with little regard to his precedent book. The leading terms of agreements are generally drawn out by the parties themselves, and the task of the professional draftsman consists in arranging those terms in proper order, clothing them with legal language, and supplying the deficiencies of provision for unforeseen contingencies. If the agreement to be prepared be special or complicated, this is a task of considerable difficulty, and one which can only be successfully accomplished by a person of considerable experience.

I.

SALE OF FREEHOLDS.

COMMON AGREEMENT *for the* SALE *of* FREEHOLD ESTATE (*a*).

Parties.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—, BETWEEN A. B., of &c., [*vendor*],

(*a*) It will be seen, that the precedents of agreements for sales and purchases contain few special stipulations as to title, or otherwise. This is because a large number of these stipulations are to be found under

SALE OF FREEHOLDS.

Agreement

of the one part; and C. D., of &c., [*purchaser*], of the other part (*b*); as follows, (that is to say): EACH of them, the said

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the head "Conditions of sale," arranged according to the subjects to which they relate. The forms there given may be very easily adapted for insertion in agreements for sale by private contract; and, therefore, to prevent needless repetition, the draftsman is referred to that source for such special stipulations as he may require.

Order of the parties to instruments of conveyance.

(*b*) In all instruments in which any thing passes, or in which it is agreed that any thing shall pass from one of the parties to another, the name of the party from whom the thing passes, or is to pass, is placed first in the arrangement of the parties. Thus, in all purchase deeds, mortgages, leases, and settlements, the names of the grantors, mortgagors, lessors, and settlors, are placed first; and the arrangement is the same in all agreements for mortgages, leases, and settlements. If the legal estate be outstanding, and be vested in any of the persons who are parties, these persons are generally made parties of the first part, in all deeds of actual conveyance, because they are naturally the first to convey; and in any agreements to which such persons are parties, it is, in most cases, best to arrange them as though the agreement were the actual conveyance. Next to the person having the legal estate, generally follow all those having partial or temporary interests, such as second mortgagees, annuitants, tenants for life, and incumbrancers of every description; the persons having the whole ultimate interest subject to the preceding partial estates and incumbrances are placed last in the order of the conveying parties. In common agreements, the parties are seldom numerous, because the persons having the principal estates generally contract alone with the purchaser, or other opposite party, and the concurrence of incumbrancers and trustees, and other necessary parties, is assumed; but so far as circumstances admit or require, it is proper to arrange the parties to agreements in such order as they would be placed in in the principal instrument.

Order of the parties to other instruments.

In instruments, in which all parties or none bear the character of conveying parties, the order of arrangement is less formally prescribed by custom, and is often a matter of indifference. Thus, in exchanges and partitions, and in agreements for such purposes, it is obviously of no consequence in what order the parties are placed; the only thing needful is to observe, that the subsequent arrangement of the different parts of the instrument should correspond with that of the parties; as, in an exchange, that the person who is party of the first part should be the first to give in exchange.

Again, in instruments which are simply agreements, that particular things shall be done; as that disputes shall be referred to arbitration, or terminated in a manner stated, no particular order of

SALE OF FREEHOLDS.

for sale and purchase.

Parcels.

Consideration.

Vendor to deliver abstract,

A. B. and C. D., (so far as relates to the acts and deeds on his own part to be performed), doth hereby agree (*c*) with the other of them, THAT the said A. B. shall sell, and the said C. D. shall purchase, ALL THAT freehold, &c., [*parcels*], with their appurtenances, and the inheritance thereof, in fee simple in possession, free from incumbrances, at or for the price or sum of £——, to be paid by the said C. D. to the said A. B. in manner following, (that is to say), the sum of £——, part thereof, immediately after the execution of these presents, and the sum of £——, remainder thereof, on the —— day of —— next, at the office of ——. THAT the said A. B. shall, within ——, from the date of these presents, at his own expense, deliver to the

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parties is required. But care must be taken, that the order once established be observed throughout the instrument; because, otherwise, not only will the draft lose generally in symmetry and perspicuity, but the references, especially those made to the parties "respectively," or, to the "respective" parties, are apt to become inaccurate and confused. In such instruments as those last mentioned, the order of parties may often be conveniently made according to the order in which they are mentioned in the recitals, or according to the order in which they are required to stand in the witnessing parts; and, indeed, if a particular order of parties is required in the witnessing parts, that is the order for the parties in the commencement of the instrument, because the arrangement in the two places should always, if possible, be the same.

(*c*) It is common to add here, "for himself, his heirs, executors, and administrators," but for what purpose is not obvious. With a view to a specific performance, the words are altogether superfluous; since, in equity, the estate becomes the purchaser's by virtue of the agreement; and a specific performance may be enforced by either party against all persons claiming through or under the other, without regard to their character of real or personal representatives. And as far as regards the purpose of bringing an action on the contract, the naming the representatives seems to be of as little use; for the instrument not being under seal cannot bind the heir, and the executors and admnistrators are bound without being named. (Co. Lit. 209. a.; *Gifford* v. *Manley*, Cas. Tem. Tal. 108; Bac. Abr. *Heir*, F.). If the agreement be under seal, it is needful that the heirs should be named; (Co. Lit. 209. a.; *Gifford* v. *Manley*, ubi supra); and it is the universal practice to name the executors and administrators.

said C. D., or his solicitor, an abstract of the title of him the said A. B. to the said hereditaments and premises. THAT the said A. B. shall, on payment, on the said —— day of ——, at the said office of ——, of the said sum of £——, remainder of the said purchase-money, execute, and procure to be executed, by all other necessary parties, (if any), a proper conveyance of the said hereditaments and premises, with their appurtenances, and the inheritance thereof, in fee-simple, free from incumbrances, unto the said C. D., his heirs and assigns, or to such uses as he or they shall direct (*d*); and that such conveyance shall be prepared by and at the expense of the said C. D., and shall be tendered or left by him on the said —— day of ——, at the said office of ——, for execution by the said A. B. THAT the said purchase shall be completed on the day and at the place lastly hereinbefore mentioned, and the said C. D. shall, on that day, be let into the possession [*or*, into the receipt of the rents and profits] (*e*) of the said premises, and up to that day all outgoings [payable by the landlord] (*e*), shall be discharged by the said A. B. THAT if, from any cause

SALE OF FREEHOLDS.

and convey.

Purchase to be completed on a given day;

(*d*) It has been usual to insert in agreements for conveyances to purchasers the words, "or to such uses as he or they shall direct," or similar expressions; but they are by no means necessary. For as the purchaser, by the contract, has acquired the absolute dominion over the estate, he may, of course, direct it to be conveyed to such uses as he shall think fit. It has, indeed, been believed, that the insertion of these words would prevent the common limitation to uses to bar dower from operating as the revocation of a will, by which the purchaser might have disposed of his equitable interest in the estate, between the execution of the contract and the conveyance; (1 Sugd. V. & P. 179); but this does not seem to have been the correct view of the subject; (*Bullin* v. *Fletcher*, 1 Keen, 369, S. C.; 2 My. & Cra. 432); and the law, with regard to revocation of wills by the alteration of the testator's estate, has been put on such a footing by the 1 Vict. c. 26, s. 23, that it has become unnecessary to attend to the question at all. The words in the text have, however, been retained, as expressing the real intentions of the parties with greater accuracy than a simple stipulation to convey to the purchaser in fee.

Utility of contract that vendor shall convey to such uses as purchaser shall appoint.

(*e*) The words in brackets are to be used when the estate is let to a tenant, omitting those relating to possession.

SALE OF FREEHOLDS.

—and from that day purchaser to take the rents and profits, and pay interest.

Compensation clause.

whatever, the said purchase shall not be completed on the said —— day of ——, the said C. D. shall pay interest after the rate of £— per cent. per annum, on the remainder of the purchase-money, from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession, [*or* to the receipt of the rents and profits] (*f*) of the premises. AND, LASTLY, THAT if any mistake (capable of compensation) be made in the description of the property, such mistake shall not annul the sale, but a compensation shall be allowed or given, as the case may require, and shall be settled by E. H., of &c., and G. H., of &c., (*g*), or an umpire to be appointed by them by writing before they commence their duty, and the decision of the said E. H. and G. H., if they agree, and of the umpire, if they disagree, shall be final. IN WITNESS whereof, the said A. B. and C. D. have hereunto set their hands, the day and year first above written.

II.

SALE OF COPYHOLD HOUSE AND FURNITURE.

AGREEMENT *for the* SALE *of a* COPYHOLD (*a*) MESSUAGE *with* FIXTURES *and* FURNITURE.

Parties.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—, BETWEEN A. B., of &c., [*vendor*],

(*f*) See note (*e*), in the preceding page.

(*g*) In case the parties do not wish to name referees at the time of the execution of the agreement, the form of agreement for the nomination of them may be taken from the form in the common Conditions of Sale, ante, page 32. Conditions vi.

Purchaser of copyholds has notice of the customs.

(*a*) When a person contracts to buy a copyhold estate, he contracts to buy it subject to all the customs, fines, heriots, and burdens, to which it is subject by the custom of the manor of which it is holden. (*Hanbury* v. *Litchfield*, 2 My. & Ke. 629). And, therefore, a provident person, before he enters into any treaty respecting copyholds, will inform himself, at least of the amount of the fines and heriots,

SALE OF COPYHOLD HOUSE AND FURNITURE.

of the one part; and C. D., of &c., [*purchaser*], of the other part: WHEREAS the said A. B. is seised or entitled of or to ALL THAT capital messuage, [*parcels*], being copyhold of the manor of ——, in the county of ——, with the appurtenances, for an estate of inheritance, to him and his heirs, according to the custom of the said manor, at, under, and subject to the rents, fines, suits, and services therefore due and of right accustomed; and the said A. B. is also absolutely entitled to certain fixtures, furniture, pictures, and other effects in or about the said messuage and premises: AND WHEREAS the said messuage and hereditaments, with the said fixtures, furniture, pictures, and other effects, have, since the —— day of ——, 18—, been occupied and used by the said C. D., as tenant to the said A. B., but no rent hath been paid by the said C. D. for the same: AND WHEREAS the said A. B. and C. D. are desirous of entering into such agreement with respect to the premises, as follows: NOW EACH OF THEM the said A. B. and C. D. (so far as relates to the acts and deeds on his own part to be performed) doth hereby agree with the other of them, THAT the said A. B. shall sell, and the said C. D. shall purchase all that copyhold messuage and hereditaments hereinbefore particularly mentioned, with their appurtenances, and the inheritance thereof, according to the custom of the said manor, in possession, free from incum-

Recital, that vendor is seised of a messuage, and entitled to chattels;

—that they have been, for a certain time, occupied and used by the purchaser, without rent paid;

—that parties desire to enter into agreement.

Agreement to sell and purchase.

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and the occasions on which they are paid; the right of the copyholder to timber and minerals, and, generally, of the nature of the customs of the manor. But it may be observed, that if a man sells copyhold property subject to a condition that the purchaser shall take the timber at a valuation, he must produce evidence to satisfy the purchaser that the copyholder has the absolute and exclusive right to the timber, although, if nothing is said about the timber, and it is, therefore, included in the purchase of the estate, the purchaser, of course, can raise no objection in respect of the lord's claim to it.

There is considerable risk in purchasing a copyhold messuage with the intention of pulling down either the messuage itself or any of the outbuildings; for such pulling down, (even if the premises be re-built), may be waste, so as to incur a forfeiture of the tenement. (See *Doe* d. *Grubb* v. *The Earl of Burlington*, 5 B. & Ad. 507; and the authorities there cited).

SALE OF COPYHOLD HOUSE AND FURNITURE.

Consideration.

brances, and also the aforesaid fixtures, furniture, pictures, and other effects at or for the price or sum of £—— (*b*), to be paid by the said C. D. to the said A. B., in manner following, (that is to say), the sum of £——, part thereof, immediately on the execution of these presents, the sum of £——, further part thereof, on the —— day of —— next, at the office of ——, and £——, the remainder thereof, on the —— day of ——, 18—, at the same office, but without interest on the said sums of £—— and £——, up to the

Vendor to deliver abstract;

said respective days of payment thereof; THAT the said A. B. shall, within —— from the date hereof, at his own expense, deliver to the said C. D. or his solicitor, an ab-

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Apportionment of stamp duty.

(*b*) The Stamp Act (55 Geo. 3, c. 184) directs, that where lands or other property of different tenures or holdings, contracted to be sold at one entire price for the whole, shall be conveyed to the purchaser in separate parts by different instruments, the purchase-money shall be apportioned in such manner as the parties shall think fit, so that a distinct price for each separate part may be set forth upon the principal or only instrument of conveyance relating thereto, which is to be charged with the ad valorem duty in respect of the price therein set forth. The act further directs, that in the case of copyholds, (with certain exceptions), the surrender or voluntary grant, or the memorandum or copy thereof, shall be deemed the principal instrument. Hence, in the case in which copyholds are sold with any other property at an entire price for the whole, an apportionment must be made for the purposes of the conveyance, although, of course, no such apportionment is required in the agreement. If the property sold with the copyhold be made or be necessarily the subject of conveyance, the price may, and, of course, always should be so apportioned as to make the stamp duty of the lowest possible amount. But if, as in the case in the text, the other property be chattels personal which pass by delivery, it would be necessary to fix a fair proportionate value on the lands and the chattels, as otherwise the transaction might be treated as a fraud on the revenue. The last observation, too, applies to cases in which lands of any tenure are sold with chattels passing by delivery. It should be remarked, however, that it is perfectly legal to make the chattels objects of conveyance, and if that be done, the price may be apportioned on the ordinary principle of reducing the duty as much as possible; but it is more usual in the instrument of conveyance of the lands, to recite that the chattels have been delivered previously to the execution of the instrument, and thus to incur no stamp duty on the part of the price apportioned for them.

stract of the title of him the said A. B. to the said messuage and hereditaments; THAT the said A. B. shall, on payment at the office aforesaid, of the said sums of £—— and £——, on the said respective days of payment thereof, at the costs and charges of the said C. D., make and procure all other necessary parties, (if any), to make a proper surrender according to the custom of the said manor of the said messuage and other hereditaments, with their appurtenances, to the use of the said C. D., his heirs and assigns, according to the custom of the said manor, free from incumbrances, but under and subject to the rents, heriots, fines, suits, and services therefore due and of right accustomed, from the 25th day of December last; and shall assign or make over to the said C. D., all the said fixtures, furniture, pictures, and other effects, in or about the said messuage and hereditaments, and shall execute a proper deed of covenants for the title, enjoyment, and further assurance of the said messuage, hereditaments, and premises, in the usual form and manner, such deed to be prepared by and at the expense of the said C. D., and to be tendered or left by him on the said —— day of ——, at the said office of ——, for execution by the said A. B.; THAT the said C. D. shall continue to have the occupation of the said messuage and hereditaments, with their appurtenances, and the use of the said fixtures, furniture, pictures, and other effects, until the completion of the said purchase (*c*), and that no rent shall be paid or payable by the said C. D. for the occupation of the said messuage and hereditaments, or the use of the said fixtures, furniture, pictures, and other effects, either before or after the date of these presents; THAT if, from any cause whatever, the said sums of £—— and £—— shall not be paid on the days hereinbefore

SALE OF COPYHOLD HOUSE AND FURNITURE.

—and convey the messuage;

—and assign the chattels.

Purchaser to continue to occupy and use, rent free, till completion of purchase.

Purchaser to pay interest on his purchase-

(*c*) It seems probable, that an agreement of this nature operates as a demise from the vendor to the purchaser, till the day fixed for the completion of the purchase; for it is an agreement that the vendor shall divest himself of the possession, and the purchaser come into it for a determinate time, and such an agreement constitutes a lease. (See Bac. Abr. tit. Leases, K.; *Wilkinson* v. *Hall*, 3 Bing. N. C. 508, 532).

SALE OF COPYHOLD HOUSE AND FURNITURE.

appointed for the payment of the same respectively, the said C. D. shall pay interest after the rate of £—— per cent. per annum, on the said sums respectively, or on so much thereof respectively as shall not be so paid, from the days on which the same respectively ought to have been paid, until the said purchase shall be completed, and the whole of the said sums respectively shall be paid; THAT all taxes, rates, quit-rents, and other outgoings payable in respect of the said premises, shall be paid up to the said 25th day of December last, by the said A. B., and from that day by the said C. D.; and, lastly, that [*add the compensation clause. See Precedent* I.] IN WITNESS &c.

money, if purchase not completed by a given day.

Taxes, &c. by whom to be paid.

Compensation clause.

III.

SALE OF AN INFANT'S ESTATE.

AGREEMENT *for the* SALE *of an* INFANT'S ESTATE *by his* MOTHER *and* UNCLE, *and for the* ASSIGNMENT *to the* PURCHASER *of a* MORTGAGE *on the* ESTATE.

THIS INDENTURE, made the —— day of ——, 18— (*a*), BETWEEN A. B. of &c., [*the uncle*], and C. D. of &c., [*the mother*], widow and administratrix to the estate of D. D., late of &c., deceased, of the one part; and E. F., of &c., [*purchaser*], of the other part: WHEREAS the said D. D., at the time of his death, was seised of the messuage, lands, and hereditaments, hereinafter particularly mentioned, and covenanted to be conveyed with the appurtenances for an estate of inheritance in fee simple, subject to a mortgage thereof made for a term of 2,000 years to Y. Z., for securing to her £2,800, and interest (*b*): AND

Parties.

Recital of seisin of ancestor, subject to a mortgage term;

(*a*) The year of the reign is often added, to avoid the chance of error in the date of the year of our Lord; but this is superfluous caution.

Recitals in the text informal.

(*b*) It will be seen that the recitals in the text are not strictly re-

SALE OF AN INFANT'S ESTATE.

WHEREAS the said D. D. died in the month of ——, 18—, intestate, and leaving D. D., an infant now of the age of ten years or thereabouts, his eldest son and heir at law: AND WHEREAS the said sum of £2,800, due to the said Y. Z., has been paid off by the said A. B., and the said mortgage debt and term have been assigned to the said A. B., his executors, administrators, and assigns, as a security for the re-payment of the said sum of £2,800, advanced by him, with interest: AND WHEREAS the said A. B. and C. D., being of opinion that it will be beneficial to the said D. D., the infant, that the said messuage, lands, and hereditaments, shall be sold, are desirous of entering into such agreement for the sale thereof to the said E. F., as is hereinafter contained, and the said E. F. is also desirous of entering into the said agreement: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said desire, and in consideration of the premises, they the said A. B. and C. D. do for themselves, their heirs, executors, and administrators, and each of them doth for himself and herself, his and her heirs, executors, and administrators, (so far as the covenants and agreements hereinafter contained are to be observed or performed by the said A. B. and C. D., or either of them, their or either of their heirs,

—of death of ancestor, leaving the infant his heir-at-law;

—of transfer of mortgage.

—that parties desire to enter into the agreement for sale.

Witnesseth mutual covenants.

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gular, or such as would be inserted in a formal instrument. This, probably, arises either from the draftsman not having before him the instruments by which the mortgage deed was created and assigned, or from his not deeming it desirable to load his agreement with a full narration of facts. As the recitals stand, they will afford an example of the way in which such recitals may be prepared in the absence of sufficient information, or when brevity is urgently required; but it may be proper to point out what would have been the formal and proper mode of reciting, if circumstances had allowed. It would have been right to have begun by reciting the mortgage deed, which would have raised a sufficient presumption that D. D. was seised in fee, there being nothing to shew the contrary, and he having dealt with the estate as absolute owner. The next recital would have been, as in the text, of the death of D. D., leaving an infant heir; and would have been followed by a formal recital of the deed of assignment of the mortgage to A. B. Then would have come the recital of the agreement for sale; and a recital that A. B. was willing to enter into such agreement as to the mortgage as is after mentioned.

SALE OF AN INFANT'S ESTATE.

executors, or administrators, or by the said D. D. the infant, or his heirs), hereby covenant with the said E. F., his heirs, executors, administrators, and assigns; and the said E. F. doth for himself, his heirs, executors, and administrators, (but so far only as the covenants and agreements hereinafter contained are to be observed or performed by the said E. F., his heirs, executors, or administrators), covenant with the said A. B. and C. D., their heirs, executors, and administrators, and also (as a separate covenant) with and to each of them the said A. B. and C. D., his and her heirs, executors, and administrators, in manner following, (that is to say), THAT the said D. D. the infant, within six calendar months next after he shall attain the age of twenty-one years, or, in case of his death before executing such conveyance as is hereinafter mentioned, the heirs at law of the said D. D., the infant, within six calendar months after they shall be capable in law to make and execute a conveyance of freehold hereditaments, and all other necessary and proper parties, shall and will, at the costs and charges of the said D. D., the infant, or his heirs, make out a good title unto, and, at the costs and charges of the said E. F., his heirs, executors, administrators, or assigns, well and effectually convey and assure unto and to the use of the said E. F., his heirs and assigns, or otherwise as he or they shall direct, ALL THAT messuage, dwelling, house, or tenement &c., [*parcels*], [*general words for messuages and lands; see Precedent* XVI. (*c*)], free from all incumbrances whatsoever, except the said term of 2,000 years, and the principal money and interest thereby secured: AND FURTHER, THAT he the said A. B., his executors or administrators, and every other person claiming or to claim through or under him, shall and will, upon the 10th day of this

That infant or his heirs, when capable, shall make out title to, and convey.

Parcels.

That the assignee of the mortgage term shall assign to purchaser.

(*c*) Under the reference of "general words" in these precedents, it must be understood that the clauses beginning by the words "and the reversion" &c., "and all the estate" &c., are to be included. But in the case in the text, if the estate clause be employed, it must be in reference to the estate of the infant and his heirs, and not to that of the parties to the agreement.

present month of October, at the expense of the said C. D., as such administratrix aforesaid, make and execute unto the said E. F., his executors, administrators, or assigns, an assignment of the said messuage, lands, and premises, for the residue which will be then unexpired of the said term of 2,000 years, subject to such equity of redemption as shall then affect the said premises, and also an assignment of the said mortgage debt or sum of £2,800, and all interest thenceforth to grow due for the same; AND ALSO, THAT he the said E. F., his heirs and assigns, shall and may at all times henceforth, until the said messuage, lands, and premises, shall be conveyed to him or them as aforesaid, or until such refusal or neglect of or by the said D. D., the infant, or his heir or heirs, to make and execute a conveyance of the said hereditaments as is hereinafter mentioned, peaceably and quietly have, hold, and enjoy (*d*) the same messuage, lands, and premises, and every part thereof, and receive and take the rents, issues, and profits thereof, to his and their own use, without any let, suit, trouble, or interruption, of, from, or by the said D. D., the infant, his heirs or assigns, or any other person or persons claiming or to claim by, from, under, or in trust for him or them, or under or in trust for the said D. D., deceased: AND THAT he the said E. F., his heirs, executors, or administrators, shall and will, upon the said 10th day of this present month of October, and upon the execution by the said A. B. of such assignments as aforesaid, pay or cause to be paid unto the said A. B., his executors, administrators, or assigns, the sum of 2,800*l.* in full, for the principal money secured to him as aforesaid; and shall and will, upon the said 10th day of the same month, pay or

SALE OF AN INFANT'S ESTATE.

That purchaser may quietly enjoy till conveyance, or refusal to convey.

That purchaser shall pay purchase-money in manner mentioned;

(*d*) An agreement by the guardian of the infant, that the purchaser may have the possession of the estate till a given time, probably amounts to a demise from the guardian to the purchaser; (see ante, Precedent II. n. (*c*); it seems that a guardian has authority to make leases of the infant's lands, which will hold good during the minority. (See Bac. Abr. tit. Lease, I. s. 9; Vaughan, 179). See, however, as to a testamentary guardian, *Roe* d. *Parry* v. *Hodgson*, 2 Wils. 129, 135.

SALE OF AN INFANT'S ESTATE.

cause to be paid to the said A. B. and C. D., or one of them, for the use and benefit of the said D. D., the infant, the further sum of 200*l.*; and also, shall and will, upon the perfecting, completing, and executing of such title to and conveyance of the said messuage, lands, and premises as aforesaid, pay or cause to be paid unto the said D. D., the infant, his heirs or assigns, the further sum of 3,000*l.*, (which said sums of £2,800, £200, and £3,000, making together the sum of £6,000, are to be considered the purchase-money in full, for the absolute purchase of the said messuage, lands, and premises, discharged of the aforesaid mortage): AND FURTHER, that he the said E. F., his heirs, executors, or administrators, shall and will, during so long as the said sum of £3,000, or any part thereof, shall remain unpaid, pay or cause to be paid unto the said A. B. and C. D., or one of them, their or one of their executors, administrators, or assigns, for the use and benefit of the said D. D., the infant, or his heirs, interest for the said sum of £3,000, after the rate of £5 per cent. per annum, (to be computed from the said 10th day of this present month of October), by equal half-yearly payments, on the 10th day of April and the 10th day of October, in every year, the first half-yearly payment of interest to be made on the 10th day of April next ensuing: AND THAT he the said E. F., his executors, administrators, or assigns, shall not nor will call in nor compel payment of the said principal sum of £2,800, so to be advanced and paid by him to the said A. B. as aforesaid, or any part thereof, or any interest for the same, or for the said sum of £200, until default shall be made in the performance of some one or more of the covenants and agreements hereinbefore contained, and on the part of the said A. B. and C. D., or one of them, their or one of their heirs, executors, or administrators, or of the said D. D., the infant, or his heirs, to be observed and performed: PROVIDED, THAT, if the said D. D., the infant, for the space of six calendar months next after he shall attain the age of twenty-one years, or, in case of his death before executing such conveyance as aforesaid, if the heirs-at-law of the said D. D. the infant, for the

—and interest on unpaid part.

That purchaser shall not call in mortgage-money till default be made in the agreement.

Provision in case of infant or his heir refusing to complete the contract.

SALE OF AN INFANT'S ESTATE.

space of six calendar months next after they shall be capable by law to make and execute a conveyance of freehold lands, shall refuse or neglect to make out a good title unto, and execute a proper conveyance of the said messuage, lands, and premises, and the inheritance thereof, in fee simple, unto the said E. F., his heirs or assigns, free from incumbrances, except as aforesaid, (such conveyance being prepared and tendered for execution, by and at the expense of the said E. F., his heirs or assigns); then the said E. F., his executors, administrators, or assigns, shall, at any time thereafter, be entitled to demand, sue for, recover, and receive of and from the said D. D., the infant, his heirs or assigns, or the personal representative for the time being of the said D. D., deceased, the said sum of £2,800, so to be paid by the said E. F. to the said A. B. as aforesaid, with interest thereon, to be computed from the said 10th day of this present month of October to the day on which the said principal money shall be actually paid; and the said A. B. and C. D., or one of them, their or one of their heirs, executors, or administrators, shall and will, immediately on such refusal or neglect, repay, or cause to be repaid unto the said E. F., his executors, administrators, or assigns, the said sum of £200, so to be paid by the said E. F. as aforesaid, together with interest for the same after the rate of £5 per cent. per annum, to be computed from the said 10th day of October to the day on which the repayment of the said sum of £200 shall be actually made; and also, shall and will, at the same time, pay or cause to be paid unto the said E. F., his executors, administrators, or assigns, the further sum of £4,000, by way of liquidated damages (*e*), for the non-performance of the covenants and

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Penalty or liquidated damages.

(*e*) Whenever it is the intention of the parties to an agreement, that a party committing a breach of it shall pay an ascertained sum as damages, the agreement should contain an express stipulation, that such sum is to be paid as "liquidated damages." For otherwise, it seems that the sum to be paid will be considered as a penalty, and the amount of damages will be for the consideration of a jury. (*Astley* v. *Weldon*, 2 Bos. & Pul. 346). It is not, indeed, essential that the words "liquidated damages" should be employed, if the in-

SALE OF AN INFANT'S ESTATE.

agreements hereinbefore contained; and on the part of the said A. B. and C. D., or either of them, their or either of their heirs, executors, or administrators, or of the said D. D., the infant, or his heirs, to be observed and performed: IN WITNESS whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

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tention of the parties is otherwise clear; (*Lowe* v. *Peers*, 4 Burr. 2235; *Fletcher* v. *Dyche*, 2 T. R. 232; *Jones* v. *Green*, 3 You. & Jerv. 298; *Huband* v. *Grattan*, 1 Al. & Na. 389); but, of course, it is always best to express the intention, and not leave it to be implied. When the stipulation is either expressly, or by implication, that the party committing a breach of the agreement shall pay a fixed sum as liquidated damages, it is clear that he cannot have any relief as against a penalty, or recover any additional compensation, but must pay the exact sum; (*Barton* v. *Glover*, Holt, N. P. 43; *Reilly* v. *Jones*, 1 Bing. 302; S. C. 8 J. B. Moore, 244; *Lowe* v. *Peers*, *Jones* v. *Green*, ubi supra); and there can be very little doubt that this holds as well in the case of agreements not under seal as in the case of those which are under seal, although the contrary has been affirmed in a recent case at Nisi Prius. (*Randall* v. *Everest*, 2 Car. & Pay. 577). Several of the other cases cited in this note were cases of agreements not under seal, but the point does not seem to have been raised in any of them.

If the statement in the agreement be ambiguous, as that "the penal sum of £ —— shall be paid as liquidated damages," the court will endeavour to collect the real intention of the parties from the general terms of the instrument. (*Davis* v. *Penton*, 6 B. & C. 216; S. C. 9 D. & R. 369; *Horner* v. *Graves*, 7 Bing. 735; 5 Moo. & Pay. 768; *Coisdee* v. *Bolton*, 3 Car. & Pay. 240).

But it seems that a sum cannot be fixed as liquidated damages generally, for the breach of an agreement containing different stipulations of different kinds and consequence. (*Kemble* v. *Farren*, 6 Bing. 141; S. C. 3 Moo. & Pay. 425; *Charrington* v. *Laing*, 6 Bing. 242; S. C. 3 Moo. & Pay. 587). A separate sum should, in such cases, be fixed as the damages for the breach of each separate stipulation.

IV.

AGREEMENT *for the* SALE *of a* NEXT PRESENTATION *to a* RECTORY (*a*).

SALE OF NEXT PRESENTATION.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—, BETWEEN A. B. of

Parties.

(*a*) The principal peculiarity in sales of next presentations and advowsons, is occasioned by the law relating to simony.

Simony, statutes respecting.

It does not appear that simony was an offence punishable by the common law; (2 Blac. Com. 279); but by the statute 31 Eliz. c. 6, it is enacted that if any patron for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void; the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it, for that time only. If, however, the simoniacal presentee die without having been convicted of such simony in his lifetime, such simoniacal contract shall not prejudice any innocent patron or clerk on pretence of lapse to the crown, or otherwise. Stat. 1 Will. & Mary, c. 16. By the statute 12 Anne, stat. 2. c. 12, it is declared, that if any person for money or profit shall procure, in his own name, or the name of any other, the next presentation, to any living ecclesiastical, and shall be presented thereupon, such contract is simoniacal; the presentee is disabled from holding the benefice, and the presentation devolves to the crown.

Simony, where patron presents for profit.

It is obvious, that under the statute 31 Eliz., any presentee giving or promising to the patron any benefit or profit for being presented, incurs the guilt of simony. (3 Cru. Dig. Tit. 21, Ch. II. s. 55, 56; 2 Bl. Com. 279). Marriage is a profit within the meaning of the statute. (*Byrte* v. *Manning*, Cro. Car. 191). If the presentee be not cognisant of the simony, the presentation devolves to the crown, but he is not disabled from holding the benefice. (*Hutchinson's Case*, 12 Rep. 101, 74; 3 Inst. 154, Cro. Eliz. 789; *Rex* v. *Trussel*, 1 Sid. 329, 2 Keb. 204).

By sale of presentation or advowson during vacancy.

Another kind of simony, is the sale of the presentation during a vacancy of the church, which is within the statute of 31 Eliz., and is also void at law, on account of such presentation being a chose in

SALE OF NEXT PRESENTATION.

Agreement.

&c. [*vendor*], of the one part, and C. D. of &c. [*purchaser*] of the other part, as follows; (that is to say), EACH of them the said A. B. and C. D. (so far as relates

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action which cannot be transferred. (*Bishop of Lincoln* v. *Wolferstan*, 1 Wm. Black, Rep. 490; 2 Wils. 174; 3 Burr. 1504). But if the advowson be granted during the vacancy, the grant is only void as to that presentation, and not as to the advowson. (S. C. see *Grey* v. *Hesketh*, Ambler, 268). But if the patron sells the advowson during the vacancy, neither he nor his vendee can have a quare impedit, because the vacancy makes it a chose in action, so that it does not pass to the grantee; and the grantor has destroyed his action by the conveyance. (*Leak* v. *Bishop of Coventry*, Cro. Eliz. 811). A sale during the incumbency of a clerk, who has been wrongly presented, is considered as a sale during a vacancy. (*Walker* v. *Hammersley*, Skin. 90).

It is not now deemed simony (though the contrary was formerly held) to purchase a next presentation, the church being full, with a view to present a particular person who is afterwards presented. (3 Cru. Dig. Tit. 21, Ch. II. s. 69; 6 Bing. 17.

The statutes against simony apply only to the presentation corruptly procured, or intended to be procured; and, therefore, where in pursuance of a contract which was simoniacal in respect to the next presentation, there was a conveyance of the advowson, including the next presentation; it was held that the conveyance was void only as to the simoniacal transaction, and not as to the conveyance of the advowson. (*Greenwood* v. *The Bishop of London*, 5 Taunt. 727).

Neither the purchase of an advowson in fee, nor of the next presentation alone, the incumbent being in extremis, within the knowledge of both parties, but the purchase being made without the privity, and without a view to the nomination, of any particular clerk, is void on the ground of simony. (*Barret* v. *Glubb*, 1 Wm. Bl. 1052; *Fox* v. *Bishop of Chester*, 6 Bing. 1. S. C., 1 Dow. N. S. 416).

The purchase of an advowson in fee by a clergyman, and the presentation of himself on the next vacancy, is not, it seems, within the statute 12 Anne. (Cases & opinions, 409).

See more on the subject of simony. (Bac. Abr. Tit. Simony. Watson's Complete Incumbent).

Prerogative presentation.

If the incumbent of a church be made a bishop, the king is entitled, by virtue of his prerogative, to present for that term. (3 Wils. 232). But this right only postpones, and does not take away the right of the patron of the next turn to present. (*Grocers' Company* v. *Archbishop of Canterbury*, 3 Wils. 216). And, therefore, if a man purchase the next presentation to a church, and the incumbent be made a bishop, the purchaser will be entitled to present, on the suc-

to the acts and deeds on his own part to be performed), doth hereby agree with the other of them: THAT the said A. B. shall sell, and the said C. D. shall purchase, the first and next presentation and nomination of and to the rectory and parish church of ——, in the county of ——, and diocese of ——, at or for the price or sum of £——, to be paid by the said C. D. to the said A. B., in manner following (that is to say), the sum of £——, part thereof, immediately upon the execution of these presents, and the sum of £——, remainder thereof, on the —— day of —— next, at the office of ——: THAT the said A. B. shall, within ——, from the date hereof, at his own expense, deliver to the said C. D., or his solicitor, an abstract of the title of him the said A. B., to the said next presentation (*b*): THAT the said A. B. shall, on payment, on the said —— day of ——, at the said office of ——, of the said sum of ——, remainder of the said purchase money, execute and procure to be executed by all other necessary parties, (if any), a proper grant, or other assurance of the said next presentation, unto the said C. D., his executors, administrators, and assigns; and that such grant or assurance shall be prepared by, and at the expense of, the said C. D., and shall be tendered or left by him on the said —— day of ——, at the said office of ——, for execution, by the said

SALE OF NEXT PRESENTATION.

for sale.

Consideration,

for delivery of abstract,

—and for conveyance.

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ceeding vacancy. (*Cailland* v. *Troward*, 2 H. Black. 324; *Trower* v. *Cailland*, 6 T. R. 439, 778). Hence, in agreements for the sale of next presentations, it is unnecessary to provide, as is sometimes done, for the incumbent being promoted to a bishopric.

The next presentation to a church is personal property, and goes to the executor or administrator, if not specifically disposed of by will. (1 Wm.'s executors, 420; infra, Precedent XXXII. note (*d*).

Next presentation, personal estate.

(*b*) It would seem, that the title which the purchaser of an advowson, or of a next presentation, can now require, must be deduced through a period of sixty years at least, and through such longer period (if needful), as shall include three incumbencies, not reckoning the incumbencies of clerks presented by the crown, on the promotion of a former clerk to a bishopric. But it will not be required to produce, under any circumstances, a longer title than for 100 years. (See statute 3 & 4 Will. IV. c. 27, ante vol. I. p. 148).

Title to advowson and presentation.

SALE OF NEXT PRESENTATION.

A. B.: THAT if the said grant and assurance shall not be executed, or if the said purchase shall not be, in all respects completed, on the said —— day of ——, then the agreement hereby made shall, as against the party through whose neglect or default of such non-completion shall have happened, be voidable, at the option of the other party; and in case the said agreement shall be so made void, the costs and expenses of and incidental to the same, and all the costs and expenses incurred by each party in the investigation of title, and otherwise in relation to the said premises, shall be paid by the party by whose neglect or default such non-completion shall have happened (*c*): THAT

Agreement to be voidable, if the purchase be not completed at the time fixed.

Costs of the agreement.

(*c*) The clause making time the essence of the contract, should always be inserted in agreements for the sale of next presentations, because, as the purchaser can derive no pecuniary benefit from his purchase, it is for his interest to have the purchase completed, and the purchase-money paid by the day fixed.

Time, the essence of the agreement.

Disposition of a presentation to a vacancy falling during a contract for sale.

If a vacancy fall after a contract for sale of an advowson, but before the conveyance to the purchaser, the purchaser cannot present, even though the church remain void till after the conveyance. (Viner's Abr. p. 318, pl. 11, 2 Lutw. 1631). For the next presentation is a chose in action which cannot be transferred. And it would seem that, in such case, neither vendor nor purchaser has any remedy by quare impedit. (*Leak* v. *Bishop of Coventry*, Cro. Eliz. 811).

To avoid any questions of this sort, the presentation should be made before the conveyance of the advowson; and, in that case, the vendor having the legal estate is clearly the person to present. But it seems equally clear, on principle, that he is only a trustee for the purchaser, and must present such person as the purchaser shall nominate; for a trustee is bound to present the nominee of the cestui que trust. (*Barret* v. *Glubb*, 2 Wm. Black, 1052; *Lord Albemarle* v. *Rogers*, 2 Ves. Jun. 477, S. C.; 7 Bro. P. C. 522; *Boteler* v. *Allington*, 3 Atk. 458; see, too, 2 Atk. 483); and the vendor, after the contract, is simply a trustee for the purchaser. But it seems to have been decided in *Wyvill* v. *Bishop of Exeter*, 1 Price, 292, 295, that the purchaser is not entitled to nominate, unless before the vacancy fall, he has waived all objections to, and has accepted the title. It is, however, submitted, that the doctrine laid down in this case cannot be considered as law; and that the true principle is, that the purchaser is entitled to nominate if he waive his objections, and accept the title at any time, either before or after the falling of the vacancy. For, if the purchaser waive the objections, the parties are in precisely the same situation as though the title were good. The question ought

Trustee must present nominee of cestui que trust.

Wyvill v. *Bishop of Exeter.*

Remarks on.

if the said purchase shall be completed at the time and in manner hereinbefore provided, the costs and expenses of and incidental to this agreement, shall be paid by the said A. B. and C. D., in equal shares. IN WITNESS &c.

SALE OF NEXT PRESENTATION.

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to be, can the purchaser enforce a specific performance against the vendor at the time when the vacancy falls? if he can, the vendor is a trustee for him, and cannot be permitted to set up the defects in his own title as a reason for not completing the contract. It must be observed, however, that if a purchaser nominate, pending the investigation of the title, and his clerk be presented, that act would undoubtedly amount to an acceptance of the title; and if the vendor, after a vacancy, proceeded to remove the objections to the title, his so doing would, in all probability, be considered as a recognition of the purchaser's title to nominate. *Wyvill* v. *Bishop of Exeter* seems only to decide that the purchaser cannot, after a vacancy, waive objections which are not removed.

Remarks on *Paine* v. *Meller.*

The case of *Paine* v. *Meller*, 6. Ves. 349, which was much relied on in *Wyvill* v. *Bishop of Exeter*, seems to have been misunderstood. That case simply decides, that where there were valid objections to the title, the purchaser would be compelled to complete, if he had waived them, and had accepted the title before the house was burnt. But if there were no valid objections to the title, the question, whether or not the purchaser had accepted the title, would have been of no consequence; he must have completed his contract whether he would or not. When the property purchased is depreciated in value before the conveyance, the inquiry should be, whether at the time of the depreciation there was a contract binding on the purchaser; when the property gains in value, the inquiry should be, whether at the date of the gain there was a contract binding on the vendor.

Mortgagee must present nominee of mortgagor.

It may be observed here, that a mortgagee must present the nominee of the mortgagor; for a mortgagee cannot derive any pecuniary benefit from a fallen presentation. (*Mackenzie* v. *Robinson*, 3 Atk. 559; *Gardiner* v. *Griffith*, 2 P. Wms. 404; *Amhurst* v. *Darling*, 2 Vern. 401; *Gally* v. *Selby*, 1 Com. R. 343; S. C. 1 Stra. 403).

V.

SALE OF STANDING TIMBER.

AGREEMENT *for the* SALE *of* STANDING TIMBER (*a*).

Parties

ARTICLES OF AGREEMENT made and entered into, this —— day of ——, 18—, BETWEEN A. B. of &c., [*vendor*], of the one part, and C. D., of &c., [*purchaser*], of the other part; as follows, (that is to say), EACH of them, the said A. B. and C. D., (so far as relates to the acts and deeds on his own part to be performed), doth hereby agree

agree for the sale of the timber.

with the other of them, THAT the said A. B. shall sell, and the said C. D. shall purchase, at the price or sum of £——, to be paid in manner hereinafter mentioned, the 1,127 oak-trees, and the 235 elm-trees, now marked with ——, and standing in or upon the several woods and closes, or pieces of land hereinafter mentioned, (that is to say,) ALL THAT, &c., [*parcels*]: THAT the sum of £——, part of the said purchase-money, or sum of £——, shall be paid by the said C. D. to the said A. B., immediately after the execution of these presents, and the sum of £——, remainder thereof,

Payment of the purchase-money.

Whether an agreement for the sale of timber requires to be in writing.

(*a*) It is not very clear, whether an agreement for the sale of standing timber is within the fourth section of the statute of frauds, so as to require to be in writing.

In an old case, (*Anon.*, Lord Raymond, 182), it was said, that such an agreement was not within the statute; and in *Smith* v. *Surman*, 9 B & C. 561, (S. C. 4 Man. & Ry. 455), it was held, that an agreement for the sale of trees, where it seemed that the vendor was to fell them, was not within the fourth section of the statute, but was a contract for the sale of goods within the 17th section of the statute. (See more on this subject, and the cases bearing on it; 1 Sugd. V. &. P. Ch. III., sect. 1.; see, too, *Carrington* v. *Roots*, 2 Mee. & Wels. 248).

As to the question, whether fixtures are an interest in land, within the meaning of the fourth section of the statute, see *Lee* v. *Risdon*, 7 Taunt. 188; *Hallen* v. *Runder*, 1 Cro., Mee. & Ros. 266.

SALE OF STANDING TIMBER.

on or before the —— day of ——, next: THAT the said C. D., his agents, servants, and workmen, with or without horses, carts, and waggons, shall, at all times before the —— day of —— next, have full and free liberty and power to enter into and upon the said woods, closes, and pieces of land, and to fell and cut down the said trees, and every of them, in such manner (*b*) as the said C. D. shall think fit, and there to lop, cut, and strip off the branches, tops, and bark of the said trees, and every of them; and to put and make the said branches, tops, and bark into such convenient faggots, bundles, or packages as the said C. D., his agents, servants, or workmen, shall think proper; and also full and free liberty and power to bring horses and waggons in and upon the said woods, closes, and pieces of land, for the purpose of removing the said trees, branches, tops, and bark, at such times, and in such manner as to the said C. D., his agents, servants, or workmen, shall be convenient (*c*): THAT all the said trees, branches, tops, and bark, shall be removed by the said C. D. from the land of the said A. B., before the said —— day of ——, and that any or any part of the same trees, branches, tops, or bark which shall not be so removed before the said —— day of ——, shall thenceforth be forfeited to the said A. B.: THAT the said C. D. shall, by or before the said —— day of——, well and sufficiently repair and amend the hedges or fences, (if any), which shall be broken or damaged by the fall or removal of the said timber, or in any manner, by the said C. D., his agents, servants, or workmen; and shall and will

Purchaser to have liberty to enter, &c.

Timber to be forfeited to the vendor, if not removed by a given day.

Purchaser to make good all damages.

(*b*) If it be intended that the purchaser shall cut down the trees in any particular manner, as for instance, by taking or cutting them out by the roots, this should be expressly stipulated.

(*c*) "Where the law doth give any thing to any one, it giveth impliedly, whatsoever is necessary for the taking and enjoying the same;" (Co. Lit. 56. a.); and, therefore, upon a sale of standing trees, the rights of entry, and other rights necessary for the removal of the trees, belong to purchaser by implication. (11 Co. Rep. 52). But as it is not clear what are the rights which necessarily pass to the purchaser by implication, it is usual and desirable to express in the agreement, the powers he is intended to have.

SALE OF STANDING TIMBER.

make good any other injury or damage which he or they shall commit or occasion in or about the lands of the said A. B.: THAT, if any dispute or difference shall arise, respecting any of the premises or matters aforesaid, the same shall be settled by two referees, or their umpire, in manner following; (that is to say), each party shall, within fourteen days after notice to that effect shall have been given, appoint one referee by writing, and the referees so appointed, shall, before they commence their duty, appoint an umpire by writing, and the decision of such referees, if they agree, or of such umpire, if they disagree, shall be final. If either party shall refuse or neglect to appoint a referee within the time specified, the referee appointed by the other party shall make a final decision alone. IN WITNESS &c.

Arbitration clause.

VI.

FOR REFERENCE TO ARBITRATION.

AGREEMENT *for* REFERENCE *to* ARBITRATION, *relative to the* COMPLETION *of a* PURCHASE.

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. & C. D., of &c., [*purchasers*], of the one part, and E. F., of &c., and G. H. of &c., [*vendors*], of the other part: WHEREAS, on the first day of September, 1835, the following hereditaments, (that is to say), ALL THOSE, &c., [*parcels, as described in the particular of sale*], were, by the order of the said E. F. and G. H., put up to sale, by public auction, at the Swan Inn, in M., in the county of M., subject to certain conditions of sale, then and there produced; and among others, the following conditions, (that is to say); 3rd, The purchaser should pay down immediately into the hands of the auctioneer, the auction duty over and above the purchase-money, and to Mr. B., the

Recites a sale by auction, subject to conditions;

agent to the vendors, a deposit of £10 per cent., upon and in part payment of the purchase-money, according to the conditions therein and herein next following. 4th, The purchaser to pay such remainder of the purchase-money on the 25th day of March, 1836, at the bank of Messrs. ——, in ——, and be entitled to enter into the receipt of the rents and profits from that time; and if, from any cause whatsoever, the completion of the purchase should be delayed beyond the 25th day of March, 1836, the purchaser should be considered landlord of the estate from that time, and should receive the reserved rent under the lease, but should pay interest on the remainder of the purchase-money, at £4 per cent., per annum, from Lady-day then next to the day of payment and completion of the title. 5th, The vendors to make out a good title, subject to the therein and herein last preceding condition; and deliver a full abstract thereof to the purchaser, in two months from the day of sale. 8th, The estate then offered for sale, being under a lease for forty-two years, one year whereof would be unexpired at Lady-day then next, the same was therefore sold, subject to such lease, and also to the perpetuated land-tax; and if there were any small, chief, or quit-rents payable thereout, the same was sold, subject thereto, and without any deduction to be made from the purchase-money on account thereof: AND WHEREAS, the said A. B. and C. D. attended the said sale, and being the highest bidders for, were declared the purchasers of the said houses, cottages, lands, hereditaments, and premises, at or for the price or sum of £7,600, and immediately thereupon paid into the hands of the auctioneer, the sum of £——, as and in respect of the auction duty on the said sale, and also paid to W. B., gent., the agent named in the said conditions of the said sale, the sum of £760, as a deposit of £10 per cent. upon and in part payment of the said purchase-money, and at the same time the said W. B., as such agent as aforesaid, and the said A. B. and C. D. signed a memorandum in writing of the said sale and purchase, such memorandum bearing date the day of the said sale, and being annexed to the said conditions: AND

FOR REFERENCE TO ARBITRATION.

—purchase, at the sale, by the parties of the first part;

—act of parlia-

FOR REFERENCE TO ARBITRATION.

ment under which the sale was made;

WHEREAS, upon the abstract of the title of the said E. F. and G. H. to the said mills, dwelling-houses, cottages, lands, hereditaments, and premises, being delivered to the said A. B. and C. D., as such purchasers as aforesaid, it appeared that the said sale was made under the authority or the supposed authority of an act of parliament, made and passed in the seventh year of his late Majesty King George the Fourth, intituled, "An Act for enabling the trustees under the will of J. M., Esq., deceased, to sell the manor of P., in the county of D., with divers estates within the parish and manor of P., and for applying the monies to arise from the sale thereof, in the purchase of other estates in the county of D., to be settled to the subsisting uses of the said will;" and which act received the royal assent on the 12th day of March, 1827; by which act, after (among other things) noticing that the therein mentioned two cotton mills, and the houses, mills, dams, and fifteen acres of land or thereabouts, attached thereto, (thereby meaning the mills, dwelling-houses, cottages, lands, hereditaments, and premises, so put up for sale as aforesaid), were then under lease, of which ten years would remain unexpired at Lady-day then next, (meaning thereby Lady-day, 1827), at the very low rent of 40*s*., and that the same, by reason of such existing lease, could not then be sold to advantage, it was (among other things) enacted, that the said two cotton mills, and the houses, mills, dams, and fifteen acres of land or thereabouts, attached thereto, with the appurtenances, should be, and the same were thereby vested in and settled upon the said E. F. and G. H., their heirs and assigns, for ever, upon trust at any time or times after the end or other sooner determination of the existing lease of the said cotton mills, houses, mills, dams, and fifteen acres of land or thereabouts, to sell the same with their appurtenances, as in the said act mentioned: AND WHEREAS, (as appears by the recitals hereinbefore contained), the aforesaid sale was made so as to take effect from the 25th day of March, 1836, the same being the period of one year before the expiration of such lease, and in consequence, the said A. B. and C. D., being advised that without reference

—that purchasers are advised that the sale was not authorized by the act;

to any other question relating to the title to the said mills, dwelling-houses, cottages, lands, hereditaments, and premises, the said E. F. and G. H. were not authorized under the provisions of the said act of parliament to make the aforesaid sale, objected to complete the said purchase, insisting that they the said purchasers would not be safe in so doing without the sanction and indemnity of a court of equity, and further insisting that even although a court of equity should think the said sale a beneficial sale for the parties for whom the said E. F. and G. H. were trustees, and, consequently, should be willing to sanction and confirm the same, still the said A. B. and C. D. ought not to be compelled to complete the said purchase, since, had the purchased property risen in value, the said trustees would not have been allowed to carry into effect the said sale to the prejudice of the parties for whom they were trustees, and consequently, the said A. B. and C. D. would not have been allowed the benefit of such rise in value: AND WHEREAS the said A. B. and C. D., and their partners, being in possession of the said purchased premises, by virtue of the aforesaid lease, the said A. B. and C. D., upon the faith of a good title being made out to the said premises, did, after the said sale, with the privity of the said E. F. and G. H., make certain alterations in or about the said messuages, in respect of which alterations, the said A. B. and C. D., claim a compensation (*d*): AND WHEREAS in consequence of the said E. F. and G. H. declining to rescind the said sale, an action hath been commenced against them by the said purchasers, in her Majesty's Court of Queen's Bench at Westminster, for the recovery of the said sum of £760, so paid by way of deposit as aforesaid, with interest for the same, and the costs, charges, damages, and expenses expended, sustained, and incurred by the said A. B. and C. D., in and about the premises, which

FOR REFERENCE TO ARBITRATION.

—that purchasers, being in possession of the property, have laid out money thereon;

—that purchasers have brought an action for their deposit, &c.;

(*d*) Generally speaking, a purchaser who has been let into possession of the estate, and has laid out money in lasting improvements, is entitled to compensation for those improvements, if the vendor's title turn out defective. (*Ex parte Hughes*, 6 Ves. 617; 2 Sugd. V. & P. 266; and the cases there cited).

FOR REFERENCE TO ARBITRATION.

—that it has been agreed to refer matters to arbitration.

Witnesseth mutual covenants by parties.

action is still pending: AND WHEREAS for the ending and settling of all difficulties in and about the premises, the said parties hereto have respectively agreed to make and enter into the reference to arbitration and provisions hereinafter respectively mentioned and contained: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the premises, they the said E. F. and G. H. (*e*) do for them-

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Reference to arbitration by trustees,

(*e*) It is the constant practice for trustees to refer matters to arbitration, without having any special authority for so doing. By such reference, of course, they are personally bound, and are liable to be compelled by the usual process to perform the award, but it is apprehended that an award made under a reference by trustees, is not binding on the cestui que trusts, and may be impeached by them if they do not choose to acquiesce in it. Trustees should never be advised to refer disputes to arbitration, because they may, by so doing, render themselves liable to perform acts which are at variance with their duty, and, because it is their business to judge themselves what conduct is for the advantage of their cestui que trusts, and not to leave the matter to the decision of strangers. It is not clear that trustees would be compelled specifically to perform an award, without inquiring whether such a course would be for the benefit of the trust estate. (See *Bristow* v. *Binns*, 3 Dow. & Ry. 184).

—by guardians,

It has been decided that an award made upon a reference by a guardian, is not binding on an infant; (*Cavendish* v. ———, 1 Cha. Ca. 279; S. C. 1 Eq. Ca. Abr. 49; *Biddle* v. *Dowse*, 6 B. & C. 255); but the guardian may bind himself to perfom the award. (*Roberts* v. *Newbold*, Comb. 318; see, however, *Bristow* v. *Binns*, ubi supra; *Bishop of Bath and Wells* v. *Hippersley*, cited 3 Atk. 614). It has been doubted whether an award made under a reference by an infant is void, or merely voidable as against the infant; (see 7 Bac. Abr. *Void and voidable* (C.); Watson on Arbitration, 53); but it is not easy to see how the doubt has arisen, or on what principle an award made under a reference by an infant can be deemed to be otherwise than void. (See *Bowyer* v. *Blockridge*, 3 Lev. 17; *Godfrey* v. *Wade*, 6 J. B. Moore, 488). In the case of a married woman, the Court of Chancery will not permit a reference to arbitration. (*Davis* v. *Page*, 9 Ves. 350; Watson on Arbitration, 56).

—by executors,

If an executor submits matters to arbitration, he is personally bound, and if the arbitrators award him to receive less than his testator's estate is entitled to, he must make up the deficiency, as in case of a devastavit. (*Anon.* 3 Lev. 53, Com. Dig. *Administration*, (I. s.); Bac. Abr. *Executors*, L. 1; Williams's *Law of Executors*, 1108, 1st edit.) And it

selves, their heirs, executors, and administrators, and each of them doth, for himself, his heirs, executors, and administrators, (but so far only as the covenants and agreements hereinafter contained, are to be observed or performed by, or are applicable to them, or either of them, their, or either of their heirs, executors, or administrators), hereby covenant with the said A. B. and C. D., their heirs, executors, and administrators; and the said A. B. and C. D. do for themselves, their heirs, executors, and administrators; and each of them doth for himself, his heirs, executors, and administrators, (but so far only as the covenants and agreements hereinafter contained are to be observed

FOR REFERENCE TO ARBITRATION.

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is apprehended that the effect is the same, if the award is that the executors should pay more than they ought to pay.

In most wills where the winding up of the testator's estate is likely to give rise to questions of a difficult nature, a special power to refer to arbitration is given to the executors.

An executor who refers matters to arbitration, should always take care that the reference is so worded as only to render him liable to perform the award, if he has sufficient assets. For if he refer generally, without such a limitation, he will be personally bound to perform the award, whether he has assets or not. (*Barry* v. *Rush*, 1 T. R. 691; *Worthington* v. *Barlow*, 7 T. R. 453; *Riddell* v. *Sutton*, 5 Bing. 200; 1 Williams's *Law of Executors*, 1097, 1098; Watson on Arbitration, 60).

—by assignees of a bankrupt,

The assignees of a bankrupt, are, by the stat. 6 Geo. 4, c. 16, s. 88, empowered, with the consent of the major part in value of the creditors, to refer matters to arbitration, and by the stat. 1 & 2 Will. 4, c. 56, s. 43, an agreement of reference may be made a rule of the Court of Bankruptcy. (See Archbold Bankrupt Law, 353, 354).

—of an insolvent.

The recent stat. 1 & 2 Vict. c. 110, s. 52, empowers the assignees of insolvents, with the consent of the major part in value of the creditors, to refer matters to arbitration; and there was a similar clause in the act 7 Geo. 4, c. 57.

It would, probably, be held, however, that the provisions in the above acts, as to the consent of the creditors, are for the benefit of the creditors alone, and that if assignees choose to refer to arbitration without such consent, they would be personally bound to perform, and would be entitled to enforce the performance of the award. (See *Casborne* v. *Barsham*, 6 Sim. 317).

As to submissions by corporations and charities, see Watson on Arbitration, 58, 59; and by attornies, solicitors, agents, and partners, Ibid. 65. 67.

FOR REFERENCE TO ARBITRATION.

or performed by, or are applicable to them, or either of them, their, or either of their heirs, executors, or administrators), covenant with the said E. F. and G. H., their heirs, executors, and administrators, in manner following; (that is to say): THAT it shall be, and it is hereby referred to S. S., Esquire, barrister-at-law, one of her Majesty's counsel learned in the law, (an arbiter indifferently elected, and named on the respective parts and behalves of all the said parties hereto respectively, and their respective heirs, executors, and administrators), to arbitrate, determine, and award of and concerning all, and all manner of difficulties, questions, matters, and things, which have arisen, or which may arise between the said parties hereto respectively, or their respective heirs, executors, or administrators, in respect of, or in anywise relating to the said sale, and generally of, and concerning the premises, including therein the question (*f*), whether the said E. F. and G. H. were, or were not duly authorized to make the aforesaid sale; and whether the said purchasers ought, or ought not to complete the said purchase, and the aforesaid claim to compensation; and any question or questions as to a compensation being made to either party, in respect of the delay which hath arisen in or about the completion of the said purchase, or in any other respect; and if the said arbiter shall be of opinion that the said present sale ought not to be carried into effect; it shall be lawful for him,

That it shall be referred to an arbitrator, named,

—to decide on the matters in dispute,

As to the conclusiveness of the arbitrator's decision on law.

(*f*) If a point of law be referred to the decision of an arbitrator, the parties are bound by his decision, whether right or wrong, unless fraud or corruption is imputable; (*Steff* v. *Andrews*, 2 Mad. 6; *Wood* v. *Griffith*, 2 Swans. 52); and the arbitrator's decision as to the admission of evidence is conclusive. *Campbell* v. *Twamlow*, 1 Price, 81; *Wohlenberg* v. *Lageman*, 6 Taunt. 254; 1 Marsh. 579). And where matters are referred generally to an arbitrator, who is a lawyer, the referee is thereby made judge of the law as well as the fact. (*Perriman* v. *Steggall*, 9 Bing. 679, S. C.; 3 M. & Scott. 93; see, too, *Cramp* v. *Symons*, 1 Bing, 104; 7 Moore, 434; *Williams* v. *Jones*, 5 Man. & Ryl. 3).

See further on this subject, Watson on Arbitration, 226, 234. (*Symes* v. *Goodfellow*, 2 Bing. N. C. 532; *Steeple* v. *Bonsall*, 4 Ad. & Ell. 950).

if he shall see fit so to do, to fix the price and terms (*g*) upon which the said mills, dwelling-houses, cottages, lands, hereditaments, and premises, shall be sold by the said E. F. and G. H., or the survivor of them, or his heirs, to the said A. B. and C. D., their heirs, executors, or administrators; and to and for that end, or for any other purpose in relation to the premises, it shall be lawful for the said arbiter, if he shall see fit so to do, at the expense of the parties in difference, or one of them, to require the aid, and take the opinion (*h*) of, any surveyor or surveyors, or other person or persons; and to adopt such other measures, and give all such directions as shall appear to the said arbiter advisable or expedient: THAT the said parties hereto respectively, and their respective heirs, executors,

FOR REFERENCE TO ARBITRATION.

—with power to take opinions, &c.

That parties will observe the award.

(*g*) There is no doubt, that an agreement to sell upon terms to be fixed by arbitrators, is binding; and that when the terms have been fixed, according to the agreement, a court of equity will decree a specific performance. (*Blundell* v. *Brettargh*, 17 Ves. 241; *Milnes* v. *Gery*, 14 Ves. 400; *Chichester* v. *M'Intyre*, 1 Dow, N. S. 460, S. C.; 4 Bligh, N. S. 78). But if the arbitrators do not fix the terms, the court will give no assistance. (*Milnes* v. *Gery*, ubi supra; *Hopcraft* v. *Hickman*, 2 Sim. & Stu. 130; *Emery* v. *Wase*, 5 Ves. 846). Where on an agreement for a sale of lands, the title was objected to, and all questions were referred to arbitration; and the arbitrator decided, that the purchaser should take the title with an indemnity; it was held that he had exceeded his authority, and that the award was bad. (*Ross* v. *Boards*, 3 Nev. & Per. 382).

Agreement to sell at a valuation.

(*h*) An arbitrator has a right to take the opinions of professional or other qualified persons, for the purpose of enabling him to form his decision. (*Hopcraft* v. *Hickman*, 2 Sim. & Stu. 130; *Emery* v. *Wase*, 5 Ves. 846, 848). But where there are more arbitrators than one, those arbitrators have no authority to agree to take the opinion of another person, and to be bound by it, whatever it shall be. (*Hopcraft* v. *Hickman*, ubi supra). It is desirable, however, to give the arbitrator specific authority to call in all assistance which he shall deem expedient; and to provide, that the cost of such assistance shall be borne by the parties to the reference, for otherwise, as the arbitrator takes opinions for his own satisfaction, it is by no means clear, that he could call on the parties to reimburse him the expenses which he might so incur.

Arbitrator's power to take opinions and advice.

FOR REFERENCE TO ARBITRATION.

or administrators, shall and will, on their respective parts and behalves, in all things, well and truly, stand to, obey, abide by, observe, perform, fulfil, and keep (*i*) the award, order, arbitrament, final end, and determination of the said S. S. of and concerning the differences, questions, matters, things, and premises, so agreed to be referred to him the said arbiter, as hereinbefore is mentioned, so as the award of the said arbiter be made in writing under his hand, and ready to be delivered (*k*) to the said parties respectively,

Award to be ready by a given day.

Revocation of reference to arbitration.

(*i*) Before the statute 3 & 4 Will. 4, c. 42, it was competent for either of the parties to a reference to arbitration, to revoke the reference at any time before the award was made. (*Milne* v. *Gratrix*, 7 East, 608; *King* v. *Joseph*, 5 Taunt. 452). Such a revocation, however, was a breach of the agreement to abide by and perform the award; (*King* v. *Joseph*, ubi supra; *Warburton* v. *Storer*, 4 B. & C. 103, S. C.; 6 Dow. & Ry. 213); and if the reference had been made a rule of court, a revocation of the authority was a contempt of court. (*Haggett* v. *Welsh*, 1 Sim. 134). But, by the stat. 3 & 4 Will. 4, c. 42, s. 39, no reference to arbitration containing an agreement, that it shall be made a rule of court, is revocable, without the order, either of the court or of a judge. (See further, on the subject of revocation, Watson on Arbitration, 21, 35).

As to the delivery of the award on the day fixed.

(*k*) Where the day is fixed for the delivery of the award in the manner in which it is fixed in the precedent, if the award be actually made on the day, it is then ready to be delivered; and in pleading, it is not necessary to aver that the award was ready to be delivered. But if either of the parties do, on the last day, request the arbitrators to deliver the award to him, and they neglect, or refuse to do so, the reference is void; but the matter must be specially pleaded. (1 Wms. Saund. 327 b. and the cases there cited; *Brown* v. *Vawser*, 4 East, 584). An award is to be considered as published within the meaning of the statute 9 & 10 Will. 3, c. 15, when the parties have notice that it is ready for delivery, on payment of the reasonable charges. (*Musselbrook* v. *Dunkin*, 9 Bing. 605, S. C.; 2 M. & Scott, 740; see further, Watson on Arbitration, 105, 114).

It is said that, if no time is fixed, within which the award is to be made, still the arbitrator must make the award within a reasonable time, of which the court shall judge. (*Curtis* v. *Potts*, 3 Mau. & Sel. 145, and cases there cited; *Macdougall* v. *Robertson*, 2 You. & Jerv. 11). Of course, however, a time should always be fixed with a limited power to the arbitrator of enlarging it. If the reference contain an agreement for making it a rule of court, the time may be

FOR REFERENCE TO ARBITRATION.

or their respective heirs, executors, or administrators, or such of them as shall desire the same, on or before the —— day of ——, now next ensuing, or on or before such subsequent day, not exceeding —— calendar months from the day of the date of these presents, as the said arbiter shall, at any time, or from time to time, by writing, under his hand appoint: THAT the said parties hereto respectively, and their respective heirs, executors, or administrators, shall and will, if the same shall be required by the said arbiter, attend personally upon him, and submit to be examined relative to the premises; and shall and will produce to, and deposit with, the said arbiter, all such deeds, evidences, letters, papers, and writings, relative to the premises, as shall be in the possession or power of the said parties respectively, or their respective heirs, executors, or administrators; and as the said arbiter may wish to peruse or inspect; and shall and will, so far as in them respectively may be, furnish, or cause to be furnished, the said arbiter with all such documents, proofs, and evidence, and do or cause to be done, all such acts and things for better enabling him to make the said award, as the said arbiter shall require (*l*). THAT the said parties

Award to be ready by a given day.

That parties will be examined, and furnish evidence.

That witnesses may be examined on oath.

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enlarged by the court, or a judge thereof. See 3 & 4 Will. 4, c. 42, sect. 39; *Burley* v. *Stephens*, 1 Mee. & Wels. 156. See Watson on Arbitration, 114, 121.

As to the examination of the parties and witnesses.

(*l*) The clause in a reference to arbitration, authorizing the arbitrator to examine the parties, empowers him to examine either of them to a point upon which no other evidence can be adduced on the same side. (*Warne* v. *Bryant*, 3 B. & C. 590; S. C. 5 D. & R. 301). And to waive the objection taken to the competency of a witness, that he has such an interest that he ought to have been made a party. (*Lloyd* v. *Archbowle*, 2 Taunt. 324). And it is no sufficient reason for revoking a reference to arbitration, that one party has died, so that the other cannot have the benefit of having him examined. (*Smith* v. *Fielder*, 10 Bing. 306). See further, Watson on Arbitration, 102—105.

Before the act, 3 & 4 Will. 4, c. 42, it seems that there was no power in an arbitrator, or in the court, to compel the attendance of witnesses; (*Wansel* v. *Southwood*, 4 Man. & Ry. 359); and see the Second Report of the common law commissioners; but, by sect. 40 of

FOR REFERENCE TO ARBITRATION.

respectively, or their respective heirs, executors, or administrators, if examined, and all other witnesses who shall be produced to give evidence before the said arbiter, of and concerning the premises, shall, (if required by the opposite party, or the party against whom such witnesses shall be produced), and also, any surveyor or surveyors, or other person or persons, who may be called upon by the said arbiter as aforesaid, shall, (if the same shall be thought proper by the said arbiter), be examined upon oath, or upon their affirmation, in cases where affirmation is allowed by law instead of oath (*m*). THAT the said action, now depending between the said parties, shall be suspended, and no further proceedings had therein during the said reference; and that neither party, (including therein the representatives of any person or persons dying), shall or will, during the said reference, commence or prosecute any action, suit, or proceeding in any court of law or equity, against each other, (including representatives as aforesaid),

That pending action shall be suspended, and no further legal proceedings taken.

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the above act, whenever the submission contains an agreement for making it a rule of court, the court, which is mentioned in the submission, or any judge, by rule or order, may command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and disobedience is to be deemed a contempt, subject to the rules as to notice, and costs and time of attendance in the act mentioned.

As to examination upon oath.

(*m*) Previously to the stat. 3 & 4 Will. 4, c. 40, an arbitrator could not be empowered to examine upon oath. (*Halfhide* v. *Fenning*, 2 Bro. C. C. 336; 6 Ves. 280). But by the above statute, section 41, it is enacted, that when it shall be agreed in any submission, containing an agreement, to make it a rule of court, that the witnesses shall be examined upon oath; the arbitrator or umpire, or any one arbitrator, may, and are required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath, and perjury may be assigned on such oath or affirmation. It was held, before the statute, that an award was not to be set aside on the ground of the witnesses not having been examined upon oath, if the objection was not taken at the examination. (*Ridout* v. *Pye*, 1 Bos. & Pul. 91).

As to the cases in which affirmation is allowed by law instead of oath, see 7 & 8 Will. 3, c. 34; 3 & 4 Will. 4, c. 49, c. 82; and 1 & 2 Vict. c. 77.

FOR REFERENCE TO ARBITRATION.

or against the said arbiter, in relation to the premises; and that these presents shall, and may be pleaded in bar to any such action, suit, or proceeding (*n*). THAT the costs (*o*), charges, and expenses, of and attending, or in anywise relating to this present submission to arbitration, including the expenses of preparing, perfecting, and executing two parts of these presents, and two parts of the award; and the charges of the respective solicitors of the parties respectively, or their respective heirs, executors, or administrators, in relation to such submission, and the previous correspondence; and including the compensation to be made to the said arbiter for his trouble, and the compensation to be made to any surveyor or surveyors, or other person or persons who may be called in by the said arbiter as aforesaid; and also the cost incurred in, or about, or in anywise relating to the said action, by the plaintiffs and defendants, and all costs, charges, and expenses incurred by the said A. B. and C. D., in the investigation of the title to the said purchased premises; and the costs, charges, and expenses incurred by the said respective parties, in anywise relating to the said purchase, shall be in the discretion of the said arbiter, who shall direct by whom, and to whom, and in what manner the same shall be paid; and who shall be at full liberty, if he see fit, to direct that any

That all costs are to be in the discretion of the arbitrator.

(*n*) Where disputes have been referred to arbitration, and the reference has been made a rule of a court of law, a court of equity has no jurisdiction. (*Gwinett* v. *Banister*, 14 Ves. 530; *Dawson* v. *Sadler*, 1 Sim. & Stu. 530; *Nichols* v. *Roe*, 3 My. & Ke. 431; (reversing the judgment of the court below, reported 5 Sim. 156)). And it makes no difference that the parties stand to each other in the relation of trustee and cestui que trust; (*Auriol* v. *Smith*, 1 Turn. & Russ. 121); or that the reference is not made a rule of court, till after a bill is filed to impeach the award. (*Smith* v. *Symes*, 5 Mad. 74; *Nichols* v. *Roe*, ubi supra); see Watson on Arbitration, 314, 322.

If reference be made a rule of court, jurisdiction of equity is excluded.

(*o*) It is desirable to determine, in exact terms, the discretion which the arbitrator is to have in awarding costs; as his authority, independent of special agreement, is limited, and somewhat uncertain. (See the cases of *Whitehead* v. *Firth*, 12 East, 165; *Hartnell* v. *Hill*, Forrest, 73; *Taylor* v. *Gordon*, 9 Bing. 570; S. C. 2 M. & Scott, 725; *Firth* v. *Robinson*, 1 B. & C. 277; Watson on Arbitration, 122, 136).

FOR REFERENCE TO ARBITRATION.

of such costs and expenses shall be reckoned as between attorney and client, and not as between party and party. THAT, in case any of the said parties shall die (*p*) before the making of the said award, the said reference shall not abate, or be revoked by such death or deaths; and the heirs, executors, or administrators of the party or parties so dying, shall, (so far as circumstances may require or admit, and particular regard being had to the character of the said E. F. and G. H., as trustees), be considered and taken as parties to the said reference, in the stead of, and in the like manner as their ancestor or ancestors, testator or testators, intestate or intestates. AND THAT this present submission to arbitration shall or may be made a rule of her Majesty's Court of Queen's Bench, at Westminster, according to the statute in that case made and provided, if such court shall so please, and either party, (including representatives aforesaid), shall be at liberty to apply to the said court for that purpose, and to instruct coun-

That reference shall not abate by death of parties.

That submission may be made a rule of court.

Effect of the deaths of parties before the award.

(*p*) The authority of an arbitrator is determined by the death of any of the parties to the submission, at any time before the award. *Edmunds* v. *Cox*, 3 Doug. 406; 2 Chit. 432; *Cooper* v. *Johnson*, 2 Bar. & Ald. 394; 1 Chit. 387; *Potts* v. *Ward*, 1 Marsh. 366; *Toussaint* v. *Hartop*, 7 Taunt. 571; *President and Members of the Orphan Board* v. *Van Reenen*, 1 Knapp, 100). But this consequence may be obviated by the insertion of a direction to the contrary effect, in the instrument of reference to arbitration. (*M'Dougall* v. *Robertson*, 2 You. & Jerv. 11; *Wrightson* v. *Bywater*, 3 Mee. & Wels. 199; *Dowse* v. *Coxe*, 3 Bing. 20; S. C. 10 Moore, 272; *Biddle* v. *Dowse*, 6 B. & C. 255; 9 Dow. & Ry. 404; *Clarke* v. *Crofts*, 4 Bing. 143; S. C. 12 Moore, 149). And where an arbitrator had authority to enlarge the time for making the award, and also authority to make an award after the death of any of the parties, and enlarged the time, after the death of one party, it was held, that an award, made within such enlarged time, was valid and binding on the other party. (*Tyler* v. *Jones*, 3 B. & C. 144; S. C. 4 Dow. & Ry. 740; see further, Watson on Arbitration, 23). If parties agree for a sale, at a price to be fixed by arbitration, the death of one of the parties determines the agreement, unless the contrary is directed. (*Blundell* v. *Brettargh*, 17 Ves. 241). Of course, in all references to arbitration, a clause, to prevent the authority of the arbitrators from being determined by the death of the parties, should be inserted, unless the contrary be expressly directed.

sel to consent thereto for the other party, (including representatives as aforesaid (*q*)); AND for the due observance and performance of the covenants and agreements hereinbefore contained on the part of the said E. F. and G. H.;

FOR REFERENCE TO ARBITRATION.

Covenants to be performed, under a penalty, by vendors,

(*q*) The statute referred to in the text, is the 9 & 10 Will. 3, c. 15, which enables parties to make a submission to arbitration, by bond, or other writing, a rule of court; and puts such submission on the same footing with those actually made by rule of court. Every reference to arbitration should contain an agreement for making it a rule of court; both because the parties thereby obtain the power of having the award enforced by process of attachment, and because they are not otherwise entitled to the various advantages conferred by the stat. 3 & 4 Will. 4, c. 42, and which have been pointed out in some of the preceding notes. An additional reason for always having the reference agreed to be made a rule of court is, that it is no defence to an action for the non-performance of an award, in pursuance of a reference which has not been made a rule of court, to shew collusion or misconduct in the arbitrators. (1 Wms. Saund. 327, a.). But the statute 9 & 10 Will. 3, c. 15, s. 2, enacts, that any arbitration or umpirage procured by corruption, or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint be made in the court where the rule is made for submission. (See more on this statute, and on arbitration, 1 Wms. Saunds. 327, a. b.; Watson on Arbitration, 35, 44).

References to arbitration should always be agreed to be made rules of court.

The proper and usual method, according to the statute, is, to agree to make the *submission or reference* a rule of court; but even if it be agreed to make the *award* a rule of court, it is clear that such an agreement, although erroneously expressed, is sufficient to bring the case within the statute. (*Pedley* v. *Westmacott*, 3 East, 603; *Soilleux* v. *Herbst*, 2 Bos. & Pul. 444).

Agreement may be, to make award a rule of court.

The usual course is, to agree to make the reference a rule of a court of law; but there is no objection to its being made a rule of a court of equity. (*Smith* v. *Symes*, 5 Mad. 74; 1 Russ. & My. 498, n.). In conveyancing transactions, the latter is, perhaps, the best course, from the greater familiarity which courts of equity have with those affairs.

The reference may be made a rule of a court of equity.

If a reference to arbitration be not made a rule of court, the remedy for the misconduct of the arbitrators is in equity. (*Veale* v. *Warner*, 1 Wms. Saund. 326; *Greehill* v. *Church*, 3 Ch. Rep. 88; *Earl* v. *Stocker*, 2 Vern. 251; *Barton* v. *Knight*, 2 Vern. 514). But a bill will not lie as to a question of fact referred, except for corruption, partiality, or irregularity of conduct in the arbitrator. (*Goodman* v. *Sayers*, 2 Jac. & Walk. 249).

Remedy for misconduct of arbitrators.

FOR REFERENCE TO ARBITRATION.

and each or either of them, and their, or each or either of their heirs, executors, or administrators, they, the said E. F. and G. H., do hereby bind themselves, jointly and severally, and their respective heirs, executors, and administrators, unto the said A. B. and C. D., their executors and administrators, in the sum of £——, (*r*): AND for the due observance and performance of the covenants and agreements hereinbefore contained on the part of the said A. B. and C. D., and each or either of them, their, and each of their executors or administrators, they, the said A. B. and C. D. do hereby bind themselves, jointly and severally, and their respective heirs, executors, and administrators, unto the said trustees, their executors and administrators, in the like sum of £——. IN WITNESS &c.

—and purchasers.

The effect of a penalty for non-performance of a covenant or agreement.

(*r*) The insertion of a penalty, to be paid on the non-performance of an agreement, does not release the parties from the necessity of performing it, unless, in the construction of the whole contract, it appears that the stipulated sum was designed, not as a penalty, but as liquidated damages. (1 Swanst. 318, n. a.; see ante, page 101, note (*e*)). As neither party can now revoke the reference without permission of the court or a judge, the penalty is of little use in preventing a revocation, but it may serve as the measure of damages in an action for non-performance of the award. However, it is clear, that the award being made, a court of equity will enforce a specific performance, (*Wood* v. *Griffith*, 1 Swanst. 52; *Milnes* v. *Gery*, 14 Ves. 400, 407), reserving, however, the exercise of its discretion, as to whether the agreement is reasonable. (See 1 Swanst. 54). And a court of equity will enforce an award made under an order of the court, for a reference by consent, in a cause, although arbitration bonds may have been executed in pursuance of the order, and although the award may not have been made a rule of court. (*Ormond* v. *Kynnersley*, 2 Sim. & Stu. 15; but see *Salmon* v. *Osborn*, 3 Myl. & Kee. 429).

VII.

AGREEMENT *for an* EXCHANGE *by* WAY OF MUTUAL CONVEYANCE.

FOR AN EXCHANGE.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—. BETWEEN A. B., of &c., ——, of the one part; and C. D., of &c., of the other part; as follows (that is to say): EACH of them the said A. B. and C. D. (so far as relates to his own acts and deeds), doth hereby agree with the other of them in manner following (that is to say): THAT the said A. B. shall sell, and the said C. D. shall purchase, ALL THAT &c. [*first parcels*], with their appurtenances, and the inheritance thereof, in fee simple, free from incumbrances, in consideration (*a*) of the hereditaments hereinafter agreed to be sold by the said C. D. to the said A. B., and that the said C. D. shall sell, and the said A. B. shall purchase, ALL THAT &c. [*second parcels*], with their appurtenances, and the inheritance thereof, in fee simple, free from incumbrances, in consideration of the hereditaments hereinbefore agreed to be sold by the said A. B. to the said C. D.; THAT each of them the said A. B. and C. D. shall, within —— from the

Parties.

Agreement for mutual sales and purchases.

—for furnishing abstracts of title.

(*a*) The disadvantages incident to exchanges have been pointed out in a previous note, page 50, note (*k*), and in the first volume, page 170. And, for this reason, although the agreement in the text is entitled an agreement for an exchange, it is, in effect, an agreement for mutual sales, to which it is not intended to impart any of the incidents of an exchange. It is probable, that if the agreement be for an exchange, although the parties be not able to effect an exchange in strictness of law, yet, some of the incidents may, at least in equity, be considered to attach to the transaction. There is, in a subsequent part of this agreement, an express stipulation, (though not absolutely necessary), that the agreement is not to be considered as an agreement for an exchange.

FOR AN EXCHANGE.

date hereof, at his own expense, deliver to the other of them, or his solicitor, an abstract of the title of him the said A. B. or C. D. to the said hereditaments and premises hereinbefore agreed to be sold by him respectively; THAT in case either of them, the said A. B. and C. D., shall fail in deducing a good title to the said hereditaments and premises hereinbefore agreed to be sold by him respectively, then this agreement shall be void and of no effect in respect to both of the aforesaid sales; and each of them the said A. B. and C. D., shall pay his own expenses, whether incurred in investigating the title of the other of them, or otherwise howsoever, in relation to this agreement; THAT in case each of them, the said A. B. and C. D., shall succeed in deducing a good title to the said hereditaments and premises hereinbefore agreed to be sold by him respectively, then the said A. B. shall, on the —— day of —— next, execute and procure to be executed by all other necessary parties (if any), a proper conveyance of the said firstly hereinbefore described hereditaments, with their appurtenances, and the inheritance thereof, in fee simple, free from incumbrances, unto the said C. D., his heirs and assigns, or to such uses as he or they shall direct; and the said C. D. shall, on the same day, execute and procure to be executed, by all other necessary parties (if any), a proper conveyance of the said secondly hereinbefore described hereditaments, with their appurtenances, and the inheritance thereof, in fee simple, free from incumbrances, unto the said A. B., his heirs and assigns, or to such uses as he or they shall direct; THAT the said conveyances shall be respectively prepared by, and at the expense of, the party to whom they are to be made, and shall be respectively tendered or left by such party, on the said —— day of ——, at ——; THAT the said sales and purchases shall be completed on the said —— day of ——, and at the place lastly hereinbefore mentioned; and the said A. B. and C. D. shall, on that day, be respectively let into the possession [*or* into the receipt of the rents and profits] of the said hereditaments and premises hereinbefore agreed to be purchased by them respectively, and up to that day all

If either party do not make out his title, agreement to be void.

That conveyances shall be executed of the respective properties,

—at the expense of the persons to whom they are respectively made.

Purchases to be completed on a given day.

FOR AN EXCHANGE.

outgoings payable out of the said hereditaments and premises respectively, [by the landlord], shall be discharged by the person by whom the same respectively are hereinbefore agreed to be sold; THAT, if from any cause, the said sales and purchases shall not be completed on the said —— day of ——, and shall afterwards be completed, the said A. B. and C. D. shall be respectively entitled, from the said —— day of ——, to the possession, [*or* to the receipt of the rents and profits]; and shall, from the same day, discharge the outgoings of the premises purchased by them respectively; THAT the agreement hereby entered into shall not be considered as an agreement for an exchange; THAT each of them the said A. B. and C. D., shall pay his own expenses of investigating the title of the other of them, and otherwise, in relation to the said sales and purchases, and also one equal half-part of the expenses of these articles of agreement; THAT if any mistake, capable of compensation, be made, in the description of either of the aforesaid properties, such mistake shall not annul the sales aforesaid, but a compensation shall be allowed and accepted for the same, and such compensation and also any dispute or difference which may arise respecting any of the premises or matters aforesaid, shall be settled by two referees, or their umpire, in manner following; (that is to say), each party shall, within fourteen days after notice, to that effect, shall have been given, appoint one referee, by writing; and the referees so appointed shall, before they commence their duty, appoint an umpire, by writing, and the decision of such referees, if they agree, or of such umpire, if they disagree, shall be final. If either party shall neglect, or refuse to appoint a referee, within the time specified, the referee appointed by the other party shall, alone, make a final decision. IN WITNESS &c.

Arrangement, in case they be not completed.

Each party to pay his own expenses.

Compensation clause.

VIII.

FOR AN EXCHANGE AND ACT OF PARLIAMENT.

AGREEMENT *for an* EXCHANGE, *and to apply for an* ACT *of* PARLIAMENT *to give Effect thereto.*

Parties.

ARTICLES OF AGREEMENT made and entered into &c. BETWEEN A. B., of &c., spinster, (the eldest of the four daughters, and coheirs of J. B., deceased), of the first part; C. B., of &c., (the widow of the said J. B.), of the second part; D. E., of &c., and F. E. his wife, (formerly F. B. spinster, another of the daughters, and coheirs of the said J. B.), of the third part; G. B., of &c., spinster, (another of the daughters and coheirs of the said J. B.), of the fourth part; and H. I., of &c., and L. I. his wife, (formerly L. B. spinster, the other daughter and coheir of the said J. B.), of the fifth part: [*Recites will of M. N. and settlement, in pursuance thereof, under which A. B. is tenant for life, with remainder to her children in tail, with remainders to her sisters and their children in like manner*]:

Recital of will.

—of death of an ancestor, intestate.

AND WHEREAS, the said J. B. being seised or entitled of or to several freehold messuages, lands, tenements, and other hereditaments, for an estate of inheritance, in fee simple; and being seised or entitled of or to several copyhold hereditaments, according to the customs of the several manors, of which the same were respectively holden, died, on or about the —— day of ——, intestate, leaving the said A. B., F. E., G. B., and L. I., his coheirs-at-law, and also his coheirs, according to the customs of the said manors, of which the said copyhold or customary hereditaments are holden: [*Recites settlement of the share of F. E. on her marriage, setting out the power of exchange at length; and similarly the settlement on the marriage of L. I.*]; AND WHEREAS the hereditaments mentioned and comprised in

—of settlements of shares.

—that hereditaments in first

FOR AN EXCHANGE AND ACT OF PARLIAMENT.

the first schedule hereunder written, or hereunto annexed, being part of the said estates devised by the said will of M. N., lie detached and inconvenient to be held with the residue of the said estates devised by the same will; AND WHEREAS the hereditaments mentioned and comprised in the second schedule hereunder written, or hereunto annexed, being part of the said estates which descended upon the said A. B., F. E., G. B., and L. I., on the death of the said J. B., lie intermixed with the bulk of the said estates devised by the said will of the said M. N., and are convenient to be held therewith; AND WHEREAS the said hereditaments mentioned and comprised in the said first schedule, and the said hereditaments mentioned and comprised in the said second schedule, are of equal value, as appears by a survey and valuation lately made of the same premises respectively, by X. and Y., surveyors and valuers, appointed for that purpose by the said parties to these presents; AND WHEREAS, it would be for the advantage of all the persons interested, if an exchange were effected of the said hereditaments mentioned and comprised in the said first schedule, for the said hereditaments mentioned and comprised in the said second schedule: Now, for effectuating such exchange, it is hereby agreed between the said A. B., on the one part; and the said C. B., D. E., and F. E., G. B., and H. I., and L. I., on the other part; that, as soon as the circumstances of the case will admit, an exchange shall be effected of the said hereditaments mentioned and comprised in the said first schedule hereunder written or hereunto annexed, for the said hereditaments mentioned and comprised in the said second schedule hereunder written or hereunto annexed; THAT, upon the said exchange, the said hereditaments comprised in the said first schedule hereunder written or hereunto annexed, shall be assured, limited, and settled, (freed and absolutely discharged of and from all and singular the uses, trusts, powers, provisoes, and declarations, in and by the said will of the said M. N., and the said indenture of release and settlement of the —— day of ——, or either of them, limited, declared, or contained, of or concerning the same), to the uses and

schedule are not a convenient part of devised estate;

—that the hereditaments in second schedule are intermixed with the devised estate;

—that the hereditaments in the two schedules are of equal value;

—that exchange will be advantageous.

Agreement to effect an exchange.

Hereditaments in first schedule to be limited to certain uses.

FOR AN EXCHANGE AND ACT OF PARLIAMENT.

in manner hereinafter mentioned or referred to; (that is to say), AS TO one undivided fourth part or share thereof, to the use of the said A. B., her heirs and assigns; AND AS TO one other undivided fourth part or share thereof, to the use of the said [*trustees of settlement of F. E.*], their heirs and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations in and by the said indenture of the —— day of ——, [*the settlement*], expressed, declared, and contained of and concerning the undivided part or share, and premises therein comprised, or such of them as shall be subsisting or capable of taking effect; AND AS TO one other undivided fourth part or share thereof, to the use of the said G. B., her heirs and assigns; AND AS TO the remaining undivided fourth part or share, [*to trustees of L. I.'s settlement, as before for F. E.*]; THAT upon the said exchange, the said hereditaments mentioned and comprised in the said second schedule hereunder written, or hereunto annexed, shall be assured, limited, and settled, (freed and discharged of and from the dower or thirds and freebench of the said C. B., in or out of the same, and also freed and discharged of and from the trusts, intents, and purposes, powers, provisoes, agreements, and declarations in and by the said indentures of the —— day of ——, and the —— day of ——, respectively, [*the marriage settlements*], declared or contained of or concerning the said respective undivided parts or shares of the said F. E. and L. I. of and in the same premises) To the uses upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject to which the said hereditaments mentioned and comprised in the said first schedule hereunder written, or hereunto annexed, now stand limited and settled under or by virtue of the said will of the said M. N., and the said indenture of release and settlement of the —— day of ——; THAT the said parties to these presents, or their respective heirs or assigns, shall and will forthwith apply to parliament, and endeavour to obtain an act for

Hereditaments in second schedule to be limited to certain other uses.

All parties to apply for an act of parliament.

FOR AN EXCHANGE AND ACT OF PARLIAMENT.

confirming and ratifying this present agreement, and for effectuating the said intended exchange; THAT the said hereditaments mentioned and comprised in the said first schedule hereunder written, or hereunto annexed, shall be charged with the payment of an annuity or yearly rent-charge of £——, to the said C. B. and her assigns, during her life, by equal half-yearly payments on the —— day of ——, and —— day of ——, in lieu of and in satisfaction for her dower or thirds, and freebench in or out of the said hereditaments comprised in the said second schedule hereunder written, or hereunto annexed, and the first half-yearly payment of the same annuity or yearly rent-charge, to be made on such of the said half-yearly days of payment as shall happen next after the said exchange shall be effected, if the said C. B. shall then be living; THAT all the costs, charges, and expenses of this present agreement, and of the said intended act of parliament, and all other costs, charges, and expenses incurred or to be incurred for effectuating the said exchange, or in relation thereto, shall be paid and borne by the said parties to these presents, in the proportions following; (that is to say), one equal fourth part thereof by the said A. B., one other equal fourth part thereof by the said D. E. and F. E., one other equal fourth part thereof by the said G. B., and the remaining equal fourth part thereof by the said H. I. and L. I. IN WITNESS &c.

Hereditaments in first schedule to be charged with an annuity in lieu of dower.

Costs to be paid in stated proportions.

FIRST SCHEDULE above referred to, *or* referred to in the annexed agreement.

SECOND SCHEDULE above referred to, *or* referred to in the annexed agreement.

FOR AN EXCHANGE AND ACT OF PARLIAMENT.

in manner hereinafter mentioned or referred to; (that is to say), AS TO one undivided fourth part or share thereof, to the use of the said A. B., her heirs and assigns; AND AS TO one other undivided fourth part or share thereof, to the use of the said [*trustees of settlement of F. E.*], their heirs and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations in and by the said indenture of the —— day of ——, [*the settlement*], expressed, declared, and contained of and concerning the undivided part or share, and premises therein comprised, or such of them as shall be subsisting or capable of taking effect; AND AS TO one other undivided fourth part or share thereof, to the use of the said G. B., her heirs and assigns; AND AS TO the remaining undivided fourth part or share, [*to trustees of L. I.'s settlement, as before for F. E.*]; THAT upon the said exchange, the said hereditaments mentioned and comprised in the said second schedule hereunder written, or hereunto annexed, shall be assured, limited, and settled, (freed and discharged of and from the dower or thirds and freebench of the said C. B., in or out of the same, and also freed and discharged of and from the trusts, intents, and purposes, powers, provisoes, agreements, and declarations in and by the said indentures of the —— day of ——, and the —— day of ——, respectively, [*the marriage settlements*], declared or contained of or concerning the said respective undivided parts or shares of the said F. E. and L. I. of and in the same premises) To the uses upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject to which the said hereditaments mentioned and comprised in the said first schedule hereunder written, or hereunto annexed, now stand limited and settled under or by virtue of the said will of the said M. N., and the said indenture of release and settlement of the —— day of ——; THAT the said parties to these presents, or their respective heirs or assigns, shall and will forthwith apply to parliament, and endeavour to obtain an act for

Hereditaments in second schedule to be limited to certain other uses.

All parties to apply for an act of parliament.

FOR AN EXCHANGE AND ACT OF PARLIAMENT.

confirming and ratifying this present agreement, and for effectuating the said intended exchange; THAT the said hereditaments mentioned and comprised in the said first schedule hereunder written, or hereunto annexed, shall be charged with the payment of an annuity or yearly rent-charge of £——, to the said C. B. and her assigns, during her life, by equal half-yearly payments on the —— day of ——, and —— day of ——, in lieu of and in satisfaction for her dower or thirds, and freebench in or out of the said hereditaments comprised in the said second schedule hereunder written, or hereunto annexed, and the first half-yearly payment of the same annuity or yearly rent-charge, to be made on such of the said half-yearly days of payment as shall happen next after the said exchange shall be effected, if the said C. B. shall then be living; THAT all the costs, charges, and expenses of this present agreement, and of the said intended act of parliament, and all other costs, charges, and expenses incurred or to be incurred for effectuating the said exchange, or in relation thereto, shall be paid and borne by the said parties to these presents, in the proportions following; (that is to say), one equal fourth part thereof by the said A. B., one other equal fourth part thereof by the said D. E. and F. E., one other equal fourth part thereof by the said G. B., and the remaining equal fourth part thereof by the said H. I. and L. I. IN WITNESS &c.

Hereditaments in first schedule to be charged with an annuity in lieu of dower.

Costs to be paid in stated proportions.

FIRST SCHEDULE above referred to, *or* referred to in the annexed agreement.

SECOND SCHEDULE above referred to, *or* referred to in the annexed agreement.

IX.

FOR A PARTITION.

AGREEMENT *for a* PARTITION *of* FREEHOLDS *and* COPYHOLDS *by* THREE COMMISSIONERS.

Parties.

THIS INDENTURE made &c., BETWEEN A. B., of &c., spinster, of the first part; C. B., of &c., spinster, of the second part; and D. B., of &c., spinster, of the third part:

Recites death and seisin of ancestor,

WHEREAS E. B., late of &c., being at the time of his death seised or entitled of or to several freehold messuages, lands, tenements, and other hereditaments, for an estate of inheritance, in fee-simple, and being legally or equitably seised or entitled of or to several copyhold or customary messuages, lands, tenements, and other hereditaments, for an estate of inheritance to him and his heirs according to the customs of the several manors of which the same are respectively holden,

—leaving three daughters, coheirs at law,

died on or about the 9th day of May, 1830, intestate, leaving the said A. B., C. B., and D. B., his daughters and coheirs-at-law, and also his coheirs according to the customs of the several manors of which the said copyhold or customary hereditaments are respectively holden;

—that daughters desire to enter into agreement for partition.

AND WHEREAS the said A. B., C. B., and D. B., are desirous of entering into such agreement as is hereinafter contained for making partition between them of the said freehold and copyhold hereditaments:

Witnesseth agreement,

NOW THIS INDENTURE WITNESSETH that for effectuating the said desire, it is hereby agreed and declared, and each of them the said A. B., C. B., and D. B., doth for herself, her heirs, executors, and administrators, (but so far only as the covenants hereinafter contained are to be observed or performed by her, her heirs, executors, or administrators), hereby covenant with the others, and each of the others of them, their and each of their heirs, that E. F., of &c., G. H., of &c., and I. H., of &c., shall be commissioners or arbitrators, for

—that three persons named shall be com-

FOR A PARTITION.

the purpose of making a partition of the said hereditaments, in manner hereinafter mentioned; (that is to say), THAT the said E. F., G. H., and I. K., shall, as soon as conveniently may be after the date and execution of these articles, make, or cause to be made, a proper and correct survey of all and singular the freehold and copyhold hereditaments of or to which the said E. B. died seised or entitled as aforesaid, and shall, from or by means of such survey, prepare, or cause to be prepared, a correct map or plan, or correct maps and plans, and full and particular schedules or other statements or accounts of the said hereditaments, including a statement of the different natures and tenures of the several messuages, closes, or parcels of land, and the quantities which, by admeasurement, they severally stand upon or contain, and including, also, an account of the several yearly or other sums for which the several messuages, farms, and lands are let, and of the estimated annual value of such of them (if any) as are or shall be in hand, and of the several outgoings from the same respectively, and also an account of all other particulars and circumstances which, in the judgment of the said E. F., G. H., and I. K., shall be necessary or useful in estimating the value of the said several hereditaments; THAT the said E. F., G. H., and I. K., shall, immediately after the said survey, maps, and plans, and schedules or accounts shall have been made and completed, make a full and fair valuation of all the said hereditaments, including the value of the timber standing thereon, and forthwith divide, set out, and apportion the whole of the said hereditaments into three parts or portions, in such manner as that each of the said parts or portions may conveniently be held in severalty, and as a separate estate, and may, in the estimation of the said E. F., G. H., and I. K., be of as nearly equal value as possible; THAT if, in the estimation of the said E. F., G. H., and I. K., any one of the said parts or portions shall be of unequal value with the other two, or the whole of the said parts or portions shall be of unequal value, then it shall be lawful for the said E. F., G. H., and I. K., and they are hereby required to direct, that a gross sum or

missioners to make a partition.

That commissioners shall make a survey and maps, &c.

—and valuation and apportionment of lots.

That commissioners may direct money to be paid for equality of partition.

FOR A PARTITION.

sums of money shall be paid for equality of partition, by the person or persons who shall become entitled to the portion or portions of smaller value, to the persons or person who shall become entitled to the portion or portions of greater value, such sum or sums of money to be of such amount, (not exceeding, in the whole, the sum of £——), and to be paid by and to such persons as shall, in the estimation of the said E. F., G. H., and I. K., render the partition intended to be made fair and equal; THAT when the said parts or portions shall have been apportioned and set out as aforesaid, and the sum or sums of money (if any) to be paid for equality of partition shall have been determined, the said several parts or portions shall be appropriated to the said A. B., C. B., and D. B. respectively, as they shall respectively select the same, according to an order and priority, to be determined by their drawing lots, in such manner and subject to such regulations as the said E. F., G. H., and I. K., shall appoint; THAT such one of them the said A. B., C. B., and D. B., as shall, by lot as aforesaid, obtain the privilege of the first choice, shall, by writing under her hand, within a time to be specified by the said E. F., G. H., and I. K., signify to them the said E. F., G. H., and I. K., which of the said portions she shall choose, and such one of them, the said A. B., C. B., and D. B., as shall, in like manner, obtain the privilege of the second choice, shall, by writing under her hand, within a further time to be specified as aforesaid, signify to them the said E. F., G. H., and I. K., which of the said two remaining portions she shall choose; and the said two portions so chosen respectively shall thenceforth be appropriated and belong, in severalty, to the persons respectively by whom they shall have been respectively chosen, and the remaining portion shall thenceforth be appropriated and belong, in severalty, to such one of them the said A. B., C. B., and D. B., as shall not have had the privilege of either the first or second choice; THAT as soon as conveniently may be, after the said several portions shall have been appropriated as aforesaid, they the said A. B., C. B., and D. B., and all other necessary parties (if any) shall join

That the lots apportioned shall be appropriated to the respective coparceners.

That the choice of lots is to be made within a given time.

That proper conveyances shall be executed.

FOR A PARTITION.

in conveying, surrendering, and assuring the entirety of the said freehold and copyhold hereditaments, with their appurtenances, to such uses and in such manner as shall effectually vest the entireties of the said several portions in the person to whom they shall have been respectively appropriated, so that such several portions may thenceforth be held and enjoyed, in severalty, by the person to whom they shall have been respectively appropriated; THAT, at or immediately before the execution of such conveyances, surrenders, and assurances as aforesaid, the sum or sums of money (if any) which shall be payable for equality of partition, shall be paid by and to the person by and to whom the same shall be respectively payable; and until the same shall be paid, they shall be and remain charged on the respective portions, by the respective owners of which they ought to be paid; THAT the said A. B., C. B., and D. B., shall enter into such covenants for title as are usual in conveyances on sales; and shall do all such other acts and deeds as shall be needful for effectuating the partition as aforesaid; THAT such one of them, the said A. B., C. B., and D. B., as shall obtain the privilege of the first choice in manner aforesaid, shall be entitled to the custody of all such of the muniments of title as relate to more than one of the said portions, or to any part or parts of more than one of the said portions, and shall enter into the usual covenants with the owners of the remainder of the hereditaments to which such muniments relate, for the production and furnishing copies of the said muniments; THAT a part of these presents shall be retained by each of them the said A. B., C. B., and D. B.; and that three parts of the principal deed of conveyance or partition, with all necessary maps, plans, and schedules thereunto annexed, shall be prepared and be executed by all parties; and that each of them the said A. B., C. B., and D. B., shall be entitled to retain one of the said parts; THAT the costs, charges, and expenses of preparing these presents, and making three parts thereof as aforesaid, and of the execution thereof, and of making the surveys, maps, plans, schedules, accounts, statements, and valuation aforesaid, and of allotting and appropriating the

That the equality money shall be paid before the execution of the conveyances.

That covenants for title shall be entered into.

Provision for custody of title deeds,

—of agreement and deed of partition.

Costs to be paid by the parties in equal shares.

FOR A PARTITION.

several portions aforesaid, (including the remuneration of the said E. F., G. H., and I. K.), and of all conveyances, surrenders, and assurances, to be made in pursuance of these articles, (including the expense of three parts of the said principal deed of conveyance or partition), and all and singular other the costs, charges, and expenses incurred in, or attendant upon, or incident to the making of such partition as aforesaid, shall be borne and paid by the said A. B., C. B., and D. B., in equal shares; THAT in case any of them the said A. B., C. B., and D. B., shall die before or after the said portions shall have been appropriated and awarded as hereinbefore is mentioned, or at any time before the said partition shall be completely effectuated, the heirs, devisees, executors, or administrators of the party or parties so dying, shall be considered and taken as parties to this agreement in the stead of and in like manner as their ancestor or ancestors, testator or testators, intestate or intestates; and shall be bound and obliged to do, make, and execute all such acts, deeds, and things as such ancestor or ancestors, testator or testators, intestate or intestates, were or would have been bound or obliged to do, make, and execute under and by virtue of these presents; THAT in case the said E. F., G. H., and I. K., shall differ in opinion on any of the matters hereinbefore referred to them, and any two of them shall be of the same opinion on such matter, then the opinion or decision of such two shall be conclusive as to such matter, and shall have the same force and effect as if all of them had concurred therein; but if each of them the said E. F., G. H., and I. K., shall be of a different opinion on the matter in dispute, then the same shall be referred to such umpire as they or any two of them shall select, or in case no two of them shall agree in selecting an umpire, then an umpire to be selected by lot (*a*), and the decision of such umpire shall be

Provision for the death of any of the parties.

Provision for a difference of opinion between the commissioners.

Appointment of umpire by lot.

(*a*) Arbitrators cannot appoint an umpire by lot, unless they are specially empowered so to do. (*Harris* v. *Mitchel*, 2 Vern. 485; *Wells* v. *Cooke*, 2 B. & Ald. 218). The appointment of the umpire must be the act of the will and judgment of the arbitrators, must be

FOR A PARTITION.

conclusive as to such matter, and shall have the same force and effect as if all of them the said E. F., G. H., and I. K., had concurred therein; THAT, if the said E. H., or any commissioner or arbitrator to be appointed in his place as hereinafter is mentioned, shall die, or decline, or become incapable to act as such commissioner or arbitrator as aforesaid, before the said partition shall be completely effectuated, then, and as often as the same shall happen, the said A. B. shall forthwith appoint some other person to be a commissioner or arbitrator in the stead of the said commissioner or arbitrator so dying, or declining, or becoming incapable to act as aforesaid, [*add similar clauses for C. B. to appoint in the stead of G. H., and for D. B. to appoint in the stead of I. K.*]; and every such new commissioner or arbitrator so appointed as aforesaid, shall have the same powers as if he had been originally named a commissioner or arbitrator in these presents. IN WITNESS &c.

Provision for the appointment of new commissioners.

X.

FOR A PARTITION AND ACT OF PARLIAMENT.

AGREEMENT *to make a* PARTITION, *and to apply for an* ACT *of* PARLIAMENT *to give Effect thereto—the Partition to be made by* ONE COMMISSIONER.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, BETWEEN A. B., of &c., of the

Parties.

matter of choice, and not of chance, unless the parties consent to or acquiesce in some other mode. (*In re Capell*, 9 B. & C. 624; S. C. 4 Man & Ry. 555; *Ford* v. *Jones*, 3 B. & Ad. 248). But, if the parties acquiesce in the appointment by lot of an umpire, either by the original reference or by subsequent acts, such an appointment is good. (*In re Tunno* v. *Bird*, 5 B. & Ad. 488; S. C. 2 Nev. & Man. 288). See, however, *Hodson* v. *Drewry*, Jurist, 1838, p. 1088. The law, with regard to the appointment of umpires and their powers, will be found clearly stated in Watson on Arbitration, 72—84.

FOR A PARTITION AND ACT OF PARLIAMENT.

one part; and C. D., of &c., of the other part: WHEREAS E. B., late of &c., deceased, (the father of the said A. B.), duly made, signed, and published his last will and testament in writing, bearing date the —— day of July ——, and thereby gave and devised his undivided moiety of and in a messuage, farm, and lands, called ——, situate at ——, in the parishes of ——, in the county of ——, and particularly mentioned and described in the schedule hereunder written or hereunto annexed, to his eldest son, F. B., for his life, with remainder to his first and other sons in tail male, with remainder to his second son, the said A. B, for his life, with remainder to his first and other sons in tail male, with remainder to his (the said testator's) right heirs; AND WHEREAS the said E. B. died in the month of ——, without having revoked or altered his said will, leaving the said F. B., his eldest son and heir-at-law (*a*); AND WHEREAS the said F. B. died on or about the —— day of ——, a bachelor and intestate, leaving the said A. B., his only brother and heir-at-law; AND WHEREAS the said C. D. is seised of or entitled to the other undivided moiety of and in the said messuages, farm, and lands, called ——, with the appurtenances, for an estate of inheritance in fee simple; AND WHEREAS the said A. B. hath no

Recital of will, devising a moiety of estate to be parted,

—of death of testator,

—of death of first tenant for life,

—of ownership in fee of the other moiety of the estate,

—of desire to make a partition,

(*a*) When the subject-matter of the deed is real estate, it is unnecessary to recite the probate of a will by which the estate has been devised, because probate is not required for a will of real estate, and does not affect its validity. Some practitioners recite the probate in order to preserve evidence of the place where the will may be found, and the date of the probate; but this use of recitals is not correct, (although sometimes convenient), and is hardly justifiable, so long as the progressive stamp-duty subsists.

The recital, that the testator died "without having revoked or altered his said will," is improper, because it is a recital of a negative. Unless the contrary were recited, it ought to be presumed that the will was not revoked or altered. The editor has not ventured, however, to dispense with the recital; for, although it is manifestly vicious in principle, it is sanctioned by the uniform practice of conveyancers. It owes its origin, like several other similar recitals, to the practice in bills in equity, in which the statement is made, in order to interrogate the defendant as to its truth. See ante, Introduction, page 8.

FOR A PARTITION AND ACT OF PARLIAMENT.

issue male; AND WHEREAS the said A. B. and C. D. became desirous of effectuating a partition of the aforesaid messuages and lands, upon the terms and in manner hereinafter mentioned; AND WHEREAS the titles of the said A. B. and C. D. respectively to the several moieties of and in the said messuages, farm, and lands, have been approved of by the counsel of the said parties respectively, subject to the objection which arises to the title of the said A. B. to his undivided moiety, by reason of the same having been so devised or limited to the use of his first and other sons in tail male, as is hereinbefore mentioned; NOW, for effectuating the aforesaid desire, each of them, the said A. B. and C. D., (so far as relates to the acts and deeds on the part of him, his heirs or assigns, to be performed), doth hereby agree with the other of them in manner following; (that is to say), that, on or before the —— day of —— next, a partition or division of all and singular the said messuages and lands, situate in the several parishes of —— aforesaid, and in the said schedule hereunder written, or hereunto annexed, particularly mentioned and comprised, and of all other the estates in the said parishes (if any), belonging in undivided moieties to them the said A. B. and C. D., into two separate allotments of equal value, or as nearly so as circumstances will permit, shall be made by G. H., of &c., land-surveyor; THAT when and as soon as such partition or division shall have been made, the said A. B. and C. D., or some person or persons authorized by them respectively in that behalf, shall, under the direction and in manner directed by the said G. H., draw lots for the said allotments; THAT it shall be lawful for the said G. H. to decide and determine whether any and what sum of money shall be paid for equality of partition, and by which of the parties such money shall be paid; THAT, when it shall have been determined which of the said allotments shall be taken in severalty by the said A. B., and which of the said allotments shall be taken in severalty by the said C. D.; and when the said G. H. shall have decided and determined whether any and what sum of money shall be paid for equality of partition, and by which of the parties

—that titles have been approved except in one point.

Agreement that partition shall be made by G. H.

—that allotments shall be appropriated by lot.

Money may be paid for equality of partition.

Shares to be assured in severalty, and act of Parliament applied for.

FOR A PARTITION AND ACT OF PARLIAMENT.

such money shall be paid, the said parties respectively, or their respective heirs or assigns, shall, with all convenient speed, apply to Parliament for an act to confirm the said partition or division, and make, do, and execute all such other acts, deeds, or assurances, as the counsel of the said parties respectively, or their respective heirs or assigns, shall advise or require, for the purpose of vesting such of the said allotments as shall have been decided in manner aforesaid to be taken in severalty by the said A. B., with the appurtenances, in him the said A. B., his heirs and assigns, or to such uses and in such manner as he or they shall direct or appoint, (subject and without prejudice to the devises and limitations contained in the said will of the said E. B., deceased, to or for the benefit of the issue male of the said A. B.); and for the purpose of vesting such of the said allotments as shall have been decided in manner aforesaid to be taken in severalty by the said C. D., with the appurtenances, in him the said C. D., his heirs and assigns, or to such uses, and in such manner, as he or they shall direct or appoint; THAT the said G. H. shall be and is hereby authorized to make a survey of the said estates, and to cause a map or plan to be drawn thereof; THAT the costs, charges, and expenses of preparing, engrossing, and executing this present agreement, and of making such partition or division as aforesaid, and of applying for and obtaining an act of Parliament for confirming the same, and of making such survey and such map as aforesaid, and all other costs, charges, and expenses incurred or to be incurred in or about the said partition or division, or in anywise relating thereto, (except the costs, charges, and expenses which have been incurred by the said A. B. in making out the title to his own undivided moiety of the said messuage, farm, and lands, and in investigating the title of the said C. D. to the other undivided moiety thereof, and the costs, charges, and expenses which have been incurred by the said C. D. in making out the title to his own undivided moiety of the said messuage, farm, and lands, and in investigating the title of the said A. B. to the other undivided moiety thereof; and also, except any

Commissioner to make survey and plan.

Costs (except certain parts) to be paid in equal proportions.

FOR A PARTITION AND ACT OF PARLIAMENT.

additional costs or charges which may be incurred by reason of the absence from England of either of the said parties, (which additional costs or charges are to be paid by the party whose absence shall occasion the same)), shall be paid and borne by the said A. B. and C. D. in equal proportions; THAT if either of the parties to the said intended partition shall require an attested copy or attested copies of any title deed or title deeds, whether in the custody or not in the custody of the other party to the said partition, or to have a deed of covenant for the production of any such title deed or title deeds, then, and in such case, the expense of making such attested copy or copies, and the expenses attending the framing, engrossing, and executing of such deed of covenant, shall be paid by the party requiring the same. IN WITNESS &c.

Costs of attested copies and covenants for production of title-deeds.

SCHEDULE above referred to, *or* referred to in the annexed agreement.

XI.

FOR ASSIGNMENT OF AN OUTSTANDING TERM.

AGREEMENT *between* VENDOR *and* PURCHASER, *that within a certain Period the Vendor shall cause to be* ASSIGNED *the* RESIDUE *of a* TERM *outstanding in the Premises, and which could not be assigned on the Completion of the Purchase, and that the Purchaser shall retain part of the Purchase-money as an* INDEMNITY, *until the Assignment.*

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*vendor*], of the one part, and C. D., of &c., [*purchaser*], of the other part; WHEREAS the said A. B. some time since contracted with the said C. D. for the absolute sale to him of ALL THOSE &c., [*parcels*], with their appurtenances, and the inheritance thereof, in fee-simple, free from incum-

Parties.

Recites contract for sale.

FOR ASSIGNMENT OF AN OUTSTANDING TERM.

brances, at or for the price or sum of £——; AND WHEREAS, upon investigating the title to the hereditaments so contracted to be sold, it appears that there is outstanding a term of —— years, which comprises the whole of the said hereditaments, and was created by an indenture dated the —— day of ——, and made or expressed to be made between [*parties*], and which, by divers mesne assignments and acts in the law, became ultimately vested, as to part of the said hereditaments comprised therein, in M. N., late of &c., and, as to the residue of the said hereditaments, in P. Q., late of &c., in trust to attend the inheritance of the same premises respectively; AND WHEREAS the said A. B. has hitherto been unable to discover the personal representatives of the said M. N. and P. Q.; AND WHEREAS the said A. B., being anxious to complete the sale of the said hereditaments and premises, proposed to the said C. D., that he the said A. B. should immediately convey the freehold and inheritance in fee-simple of the said purchased premises to the said C. D., and should enter into the covenant hereinafter contained on the part of him the said A. B., with respect to the assignment of the said term, and should permit the said C. D. to retain the sum of £——, part of the said purchase-money, to be held and applied by him upon the trusts hereinafter declared, and that the said A. B. and C. D. should enter into the stipulations hereinafter on their parts respectively contained; AND WHEREAS the said C. D. hath agreed to the said proposal; [*Recites conveyance of the fee to C. D.*]; NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said proposal and agreement, and in consideration of the premises, he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B., his executors, administrators, or assigns, shall and will, before the —— day of —— next, at his and their own expense, in all things, deduce and prove a good title to the said term of —— years, and sue out such limited or other letters of administration, and do all such other acts as shall be necessary in order

And existence of outstanding term.

That vendor is unable to make out the representation to the termors.

That vendor has proposed to complete on the terms contained in the agreement.

That purchaser has agreed to the proposal, and that fee has been conveyed.

Witnesseth covenant by vendor to make out the title to the term before a given day,

to the perfecting the title to the same term, and shall produce to the said C. D., his heirs and assigns, the title so deduced and proved, and procure the person or persons to whom such title shall be so deduced, to execute an assignment or assignments of the said term to a trustee nominated by the said C. D., his heirs or assigns, such assignment being prepared and engrossed by and at the expense of the said C. D., his heirs and assigns; PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that in case the said A. B., his executors or administrators, shall not, before the said —— day of —— next, at his and their own expense in all things, deduce, prove, and perfect, in manner hereinbefore mentioned, a good title to the said term, and produce the title so deduced as aforesaid, and procure the person or persons to whom the title shall be so deduced, to execute such assignment or assignments as aforesaid, or in case of any such default at any time or times thereafter, it shall be lawful for the said C. D., his heirs or assigns, to take all such steps as he or they shall think necessary, or shall or may be reasonably advised, for the purpose of deducing, proving, and perfecting a title to the said term, and procuring such assignment or assignments thereof to be made as hereinbefore is mentioned; AND IT IS HEREBY also agreed and declared, between and by the parties to these presents, that the said sum of £—— shall be retained by the said C. D., his executors or administrators, in the meantime and until such title to the said term shall be deduced, proved, perfected, and produced, and such assignment or assignments thereof executed as aforesaid, and delivered to the said C. D., his heirs or assigns; and that it shall be lawful for the said C. D., his executors or administrators, to apply the said sum of £——, or a competent part thereof, in or towards indemnifying the said C. D., his heirs and assigns, against all costs, damages, and expenses, (if any), as shall be incurred or sustained by reason of the said term not having been duly assigned to a trustee for him at the time of the conveyance of the freehold and inheritance of the said purchased premises, and also in or

FOR ASSIGNMENT OF AN OUTSTANDING TERM.

—and procure an assignment.

That in default the same may be done by purchaser.

Trusts of a part of the purchase-money to be retained by purchaser.

FOR ASSIGNMENT OF AN OUTSTANDING TERM.

towards reimbursing the said C. D., his heirs and assigns, all such costs, charges, and expenses, (if any), as he or they or any of them shall incur in deducing, proving, and perfecting the title to the said term, or in procuring the execution of the assignment or assignments thereof to a trustee for the said C. D., his heirs or assigns; and that after a title to the said term shall be so deduced, proved, and perfected, and such assignment or assignments as aforesaid executed and delivered to the said C. D., his heirs and assigns, he the said C. D., his executors or administrators, shall pay the said sum of £——, or so much thereof as shall not have been previously applied for the purpose of such indemnity or reimbursement as aforesaid, unto the said A. B., his executors, administrators, and assigns, for his and their own use. IN WITNESS &c.

XII.

FOR A MORTGAGE.

AGREEMENT *for a* MORTGAGE.

Parties.

THIS INDENTURE, made, &c., BETWEEN A. B., of &c., [*mortgagor*], of the one part, and C. D., of &c., [*mortgagee*], of the other part; WHEREAS the said C. D., on or about the 6th day of October, 1837, advanced and lent to the said A. B. the sum of £1,000, and on or about the 6th day of this instant month of June advanced and lent to the said A. B. the further sum of £3,000; AND WHEREAS all interest which accrued due on the said sum of £1,000, up to the said 6th day of June (*a*), has been paid to the said

Recites a former loan and a new loan.

That interest on the former loan has been paid up to the day of the date of the new loan.

Consolidation of different loans into one mortgage debt.

(*a*) Where there have been two separate loans or advances made before the date of the mortgage, as in the case in the text, or where, as is frequently the case, an advance has been made before the mortgage, and a further sum is advanced at the date of the mortgage, it should always be so arranged between the parties, that all interest on

FOR A MORTGAGE.

A. B.; AND WHEREAS before the said sums of £1,000 and £3,000 were so advanced and lent as aforesaid, it was agreed that the re-payment of the same respectively, with interest after the rate hereinafter mentioned, to the said C. D., his executors, administrators, and assigns, should be secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sums of £3,000 and £1,000, (making, together, the sum of £4,000), so advanced and lent by the said C. D. to the said A. B. as aforesaid, he, the said A. B., doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B., his heirs, executors, or administrators, shall and will pay, or cause to be paid, unto the said C. D., his executors, administrators, or assigns, the said sum of £4,000, with interest for the same in the meantime, from the said 6th day of this instant month of June, after the rate of £4 per cent. per annum, on the 6th day of December next ensuing the date of these presents, without any deduction or abatement for any present or future taxes or impositions, or any other matter, cause, or thing whatsoever; And, in case the said principal sum of £4,000 shall not be paid to the said C. D., his executors, administrators, or assigns, on the said 6th day of December, shall and will, so long as the said

Agreement for the security.

Witnesseth.

Covenant by mortgagor to repay the loans with interest,

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the first advance may be paid up to the day on which the second is made. For if this be not done, the two advances cannot well be consolidated into one mortgage debt, the interest on which may be reserved half-yearly, in the usual manner; because, the interest on the two component parts of the debt accrues due on different days, and requires different provisoes for redemption, and different covenants for payment. The facts, with regard to the payment of interest, and the state, in other respects, of the debt, at the date of the mortgage, should always be recited, as in the example in the text. Of course, the foregoing observations apply with greater force to the case where several prior advances are to be consolidated into one mortgage debt.

If the loan be made in an entire sum at the date of the mortgage, recitals may be dispensed with, and the witnessing part may contain a receipt for the money lent, in the usual manner.

FOR A MORTGAGE.

principal sum of £4,000, or any part thereof, shall remain due or owing, pay, or cause to be paid, to the said C. D., his executors, administrators, or assigns, interest for the said sum of £4,000, or for so much thereof as, for the time being, shall remain unpaid, after the rate aforesaid, by equal half-yearly payments, on the 6th day of December and the 6th day of June in every year (*b*): AND THIS INDENTURE FURTHER WITNESSETH, that, in further performance of the said agreement, and in consideration of the premises, he the said A. B. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said C. D., his executors, administrators, and assigns, that he the said A. B., his heirs or assigns, and all other necessary parties, (if any), shall and will, at any time hereafter, so long as the said sum of £4,000, or any part thereof, shall remain due or owing on this present security, upon the request of the said C. D., his executors, administrators, or assigns, and by such conveyances and assurances in the law as the said C. D., his executors, administrators, or assigns, or his or their counsel in the law shall reasonably advise or require, but at the costs and charges of the said A. B., his heirs, executors, administrators, or assigns, well and effectually convey and assure all and singular the messuages, lands, tenements, and hereditaments, [the particulars whereof (*c*)] are mentioned in the schedule to these presents with their and every of their rights, members,

—and interest on the same.

Further witnesseth covenant to mortgage lands in schedule.

(*b*) As it is generally intended, that the money advanced shall remain due on the security of the mortgage after the day named in the covenant for payment of the principal, this additional covenant is always now inserted, in order to enable the mortgagee to recover his interest by a separate action on the covenant, without being obliged to sue for the principal, when he wants only the interest.

Mortgage by deposit of title deeds.

(*c*) It is often necessary and desirable to make an equitable mortgage by a deposit of the title deeds of the property, and the precedent in the text may be adapted to accompany such a deposit, by omitting the words in brackets, and inserting in their place—

"comprised in the several deeds and muniments of title which"

or such other words referring to the title deeds as may suit the case.

An equitable mortgage may be made by the mere deposit of the

easements, and appurtenances, unto and to the use of the said C. D., or his executors, administrators, or assigns, and

FOR A MORTGAGE.

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deeds, without any written agreement; for the deposit is considered, in equity, as evidence of an agreement for a mortgage, which will entitle the party claiming the benefit of the agreement to all such rights as he would have been entitled to had the contract been completed. (*Russel* v. *Russel*, 1 Bro. C. C. 269; *Featherstone* v. *Fenwick*, Ib. note; *Harford* v. *Carpenter*, Ib. note; *Birch* v. *Ellames*, 2 Anst. 428; *Ex parte Wright*, 19 Ves. 255; *Parker* v. *Housefield*, 2 Myl. & Kee. 419). And the mere deposit is sufficient, without a word passing between the parties. (*Ex parte Langston*, 17 Ves. 227, 230; *Ex parte Kensington*, 2 Ves. & Bea. 79). The deposit, too, will operate as a security for further advances, as well as for monies due at the time, if there be any reasonable evidence that the advances were made on security of the deposit. (*Ex parte Langston*, ubi supra; *Ex parte Whitbread*, 19 Ves. 209).

It was formerly held, that the deposit would not act as a security, if the deeds were delivered for the purpose of enabling a legal mortgage to be prepared. (*Norris* v. *Wilkinson*, 12 Ves. 192; *Ex parte Bulteel*, 2 Cox, 243; *Ex parte Pearce*, Buck, 525). But the contrary seems now to be settled law. (*Edge* v. *Worthington*, 1 Cox, 211; *Ex parte Bruce*, 1 Rose, 374; *Hockley* v. *Bantock*, 1 Russ. 141; *Keys* v. *Williams*, 3 You. & Col. 55).

It is not necessary that all the title deeds of the estate to be charged should be deposited: a deposit of part is sufficient, unless there be evidence of intention that there should be no security till the whole were deposited. (*Ex parte Wetherell*, 11 Ves. 398; *Ex parte Chippendale*, 1 Deac. 67; S. C. 2 Mon. & Ayr. 299; *Ex parte Pearce*, Buck, 525). With respect to copyholds, some doubts seem to have been entertained; but it is now decided, that an equitable mortgage, of property held by copy of court roll, may be made by a deposit of the copies. (*Ex parte Warner*, 19 Ves. 302; *Whitbread* v. *Jordan*, 1 You. & Coll. 303; *Winter* v. *Lord Anson*, 3 Russ. 492; *Lewis* v. *John*, 1 C. P. Cooper, 8).

It is to be observed, however, that the practice of taking mortgages by mere deposit of the muniments of title, without any statement in writing, is strongly to be reprobated. The courts have frequently expressed their disapprobation of the practice; (*Ex parte Haigh*, 11 Ves. 403; *Ex parte Whitbread*, 19 Ves. 211; *Ex parte Hooper*, 1 Mer. 7); and it exposes the mortgagee to the risk of losing his security, by the production of parol evidence, to shew that the deposit was not intended as a security at all, or only as a security to a limited amount. (*Ex parte Whitbread*, 19 Ves. 209; *Ex parte Langston*, 17 Ves. 227; *Ex parte Mountfort*, 14 Ves. 606). Moreover, in the case of bankruptcy, the mortgagee will only be allowed

—not advisable.

FOR A MORTGAGE.

his or their heirs, by way of mortgage, for further securing the repayment to the said C. D., his executors, admini-

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the costs of the petition for sale, when the deposit is accompanied by an agreement in writing. (*Ex parte Brightwen*, 1 Swanst. 3; S. C. Buck, 148; *Anon.* 2 Mad. 281; *Ex parte Trew*, 3 Mad. 172; *Ex parte Warry*, 19 Ves. 472; *Ex parte Sykes*, Buck, 349; *Ex parte Reid*, Mon. & M'Arth. 114; *Ex parte Reynolds*, 2 Mon. & Ayr. 104).

Disadvantages of equitable mortgagees.

Unless as a temporary arrangement, equitable mortgages are not desirable: if made (as they always should be made), by deed, so as to have the benefit of a covenant for payment of the money, they are little less expensive than a legal mortgage; and if made by agreement, they must be stamped with the ad valorem stamp, before they can be made effectual. They afford much less security to the creditor than proper legal mortgages; because he will be postponed to legal mortgages, although subsequent, in point of date, to his own, unless he can shew that the subsequent incumbrancers had actual or constructive notice of his own security. (*Birch* v. *Ellames*, Anst. 427; *Plumb* v. *Fluitt*, Id. 432; *Whitbread* v. *Jordan*, 1 You. & Col. 303; *Ex parte Hardy*, 2 Deac. & Chit. 393). And registration is not notice. (*Morecock* v. *Dickins*, Amb. 678).

Their remedies.

The remedies, too, of an equitable, are much less efficacious and speedy than those of a legal, mortgagee. For the equitable mortgagee is, of course, unable to bring ejectment, or to arm himself with a power of sale, to be used without the concurrence of the mortgagor. He can only render his security available through the medium of a court of equity; and if the mortgagor become bankrupt, an equitable mortgagee cannot avail himself of Lord Loughborough's order, but must make a special application to the court for a sale, (Archb. Bank. Law, 6th edit. 121, 122), and is only entitled to the rents and profits from the date of the order for sale. (*Ex parte Bignold*, 2 Mon. & Ayr. 16; see, too, *Ex parte Living*, 1 Deac. 1; S. C. 2 Mon. & Ayr. 223).

It seems, that an equitable mortgagee, proceeding by bill in equity, may pray to have the mortgaged estate sold, and his debt discharged out of the proceeds; (*Pain* v. *Smith*, 2 Myl. & Kee. 417; *Smith* v. *Nelson*, Seton's Forms of Decrees, p. 180; *Meux* v. *Ferne*, and *Spring* v. *Allen*, noticed 2 Myl. & Kee. 422; *Mellor* v. *Wood*, 1 Kee. 16; *Brocklehurst* v. *Jessop*, 7 Sim. 438); or he may pray that the mortgagor be ordered to pay the debt, and, in default of payment, to convey the premises to the mortgagee, discharged of all right of redemption; (*Parker* v. *Housefield*, 2 Myl. & Kee. 419; *Newton* v. *Aldous*, *Lavender* v. *Roberts*, *Warren* v. *Barling*, and *Langdon* v. *Wilmot*, cited 2 Myl. & Kee. 421, 422; see, too, *Price* v. *Carver*, 3 Myl. & Cra. 161); but, in both cases, the mortgagor is entitled to have six

strators, or assigns, of the said sum of £4,000, or such part thereof as shall for the time being remain unpaid, with in- FOR A MORTGAGE.

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months allowed him for payment of the money. (*Parker* v. *Housefield*, and *Mellor* v. *Woods*, ubi supra). If the mortgagor be dead, leaving an infant heir, and the decree is for a foreclosure, the infant is allowed a day to shew cause against the decree, on coming of age; but if the decree be for a sale, he is not allowed a day. (*Scholefield* v. *Heafield*, 7 Sim. 669; *Price* v. *Carver*, 3 Myl. & Cra. 157). Of course, of a mortgage made by a mere deposit of deeds, there can be no registry made, as there is no instrument to be registered; and the want of registration does not affect the validity of the mortgage. (*Sumpter* v. *Cooper*, 2 Barn. & Ad. 223).

Their right against particular parties.

An equitable mortgage, by a simple contract debtor, to the crown, is binding on the crown. (*Casberd* v. *Ward*, 6 Price, 411; *Pectore* v. *Philpott*, 12 Price, 197; see the cases of *The King* v. *Snow* and *The King* v. *Benson*, 1 Price, 220; and more fully, 6 Price, 465). An equitable mortgage by an accountant to the crown, to a person who knows that he is so, is not available against the crown: (*Broughton* v. *Davis*, 1 Price, 216): whether it is, in any case, available, appears undecided.

If an equitable mortgage is to be made to a person confidentially connected with the mortgagor, as his solicitor or his wife, a deposit of deeds will not avail as against third persons. (*Bozon* v. *Williams*, 3 You. & Jerv. 150; *Ex parte Cuming*, 9 Ves. 115). And, of course, a solicitor cannot take a deposit of deeds as a security for future costs. (*Ex parte Laing*, 2 Mon. & Ayr. 381).

It is to be observed, however, that the question, as to whether a deposit of deeds is available as an equitable mortgage, is independent of the question as to the lien which the holder of the deeds may have in them. He may have no right to call for a legal mortgage, and no interest whatever in the land to which the deeds relate, but may still have a lien on the deeds for the monies he has advanced. (*Ex parte Whitbread*, 19 Ves. 211; *Ex parte Allison*, 1 Glyn & Jameson, 210).

Deposit of leases.

Great caution should be exercised as to taking a deposit of a lease as a security; for, as the depositary is, in equity, an assignee of the lease, and is entitled to call for an assignment, by way of mortgage, of the legal estate, a court of equity will compel him to take such assignment, and thereby render himself liable to the rent and covenants of the lease: (*Lucas* v. *Comerford*, 3 Bro. C. C. 166; S. C. 1 Ves. jun. 235; *Flight* v. *Bentley*, 7 Sim. 149): and the same law holds good in the case of the equitable assignee of an underlease, who is himself the original lessor. (*Jenkins* v. *Portman*, 1 Keen, 435). Hence, it is evident, that no mortgagee should ever take a lease, by way of deposit, unless it be clear that the lease is a beneficial one, or

FOR A MORTGAGE.

terest for the same respectively, after the rate aforesaid; and that such mortgage shall and may be made with, under, and subject to all such covenants, conditions, provisoes, power of sale, and other clauses, as the counsel of the said C. D., his executors, administrators, or assigns, shall reasonably advise or require; AND the said A. B. doth hereby for himself, his heirs, executors, administrators, or assigns, covenant with the said C. D., his executors and administrators, that he, the said A. B., now hath in himself

Covenant by mortgagor for right to convey.

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unless the deposit be accompanied by an agreement, negativing the liability of the depositary to take a legal assignment. The best form of such an agreement would be a stipulation for a mortgage, by way of underlease.

—of bonds, policies, &c.

The depositary of a bond does not acquire a lien on it, as against the assignees of the obligee, unless notice of the deposit be given to the obligor. (*Ex parte M'Turk*, 2 Deac. 58). So, a valid equitable mortgage cannot be made of shares in a company, by a deposit of the certificates, or by an agreement, unless notice be given of the company. (*Ex parte Spencer*, 1 Deac. 468; *Cumming* v. *Prescott*, 2 You. & Coll. 488). But the manner of making the mortgage does not seem to be of much consequence, provided that notice is given to the company. (*Ex parte Masterman*, 2 Mon. & Ayr. 209; S. C. 4 Deac. & Chit. 751). And a mortgage of a policy of assurance is not good against the assignees of the mortgagor, unless notice be given to the assurance society. (*Williams* v. *Thorp*, 2 Sim. 257). What is a sufficient notice, in these cases, will be found discussed in *Ex parte Waithman*, 4 Deac. & Chit. 412; *Ex parte Carlis*, Id. 354; *Ex parte Stright*, Mont. 502; S. C. 2 Deac. & Chit. 314; and further information on the subject of the notice required to be given by purchasers and mortgagees of *choses in actions* and equitable interests, will be found in the note on that subject, in a subsequent division of this work.

Discrepancy between agreement and deposit actually made.

Finally, however, with respect to mortgages by the deposit of documents, it should be observed, that if the deposit be accompanied by an agreement, specifying certain documents as intended to be deposited, or certain property as intended to be charged, the security will be available as to all, notwithstanding some of the documents, or the documents relating to some of the property, may not be actually deposited. (*Ex parte Leathes*, 3 Deac. & Chit. 112; *Ex parte Edwards*, 1 Deac. 611). And it is apprehended, that if the agreement specified certain documents, and more were actually deposited, the security would extend to all which were deposited, unless such a construction should be inconsistent with the tenor of the written agreement.

FOR A MORTGAGE.

good right, full power, and absolute authority to grant and release, or appoint or otherwise convey and assure the said messuages, lands, and hereditaments, comprised in the said schedule to these presents, and every part thereof, with their rights, members, easements, and appurtenances, and the inheritance thereof, in fee simple, free from any incumbrances whatsoever; and that, in the meantime and until the said mortgage shall be made and executed, the said messuages, lands, and hereditaments, and every part thereof, with their rights, members, easements, and appurtenances, shall be and remain a security to the said C. D., his executors, administrators, and assigns, and stand charged and chargeable with the payment to him and them of the said sum of £4,000 and interest as aforesaid. IN WITNESS &c.

That, until mortgage be made, lands shall be charged as a security for the monies advanced.

XIII.

AGREEMENT *with an intended* MORTGAGEE *to exercise a* POWER *of* CHARGING.

TO EXERCISE A POWER OF CHARGING.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part, and C. D., of &c., [*mortgagee*], of the other part: [*Recites will, devising estates, in strict settlement, under which A. B. is tenant for life, with power to the tenant for life to charge the estates with £——, and limit terms for raising the same; recites also death of testator, without altering or revoking the will, so far as the same is thereinbefore recited*]: AND WHEREAS the said C. D. hath this day advanced and lent to the said A. B. the sum of £——; NOW THIS INDENTURE WITNESSETH, that the said A. B. doth hereby, for himself, his heirs, executors and administrators, covenant with the said C. D., his executors, administrators, and assigns, that he, the said A. B., will, as soon as the case will admit, at his own costs and charges, by virtue and

Parties.

Recital of will,

—of loan.

Witnesseth covenant to exercise power,

TO EXERCISE A POWER OF CHARGING.

in exercise of the aforesaid power in this behalf given, or limited to him by the said will, as hereinbefore is mentioned, well and effectually subject and charge all the manors, castles, farms, lands, and hereditaments, so devised by the said will, as hereinbefore mentioned, or such part of the same hereditaments as the said C. D. shall think sufficient and satisfactory, to and with the payment to the said C. D., his executors, administrators, or assigns, of the sum of £——;

—and to limit a term,

And also limit and appoint the hereditaments so to be charged, with their appurtenances, unto the said C. D., his executors, administrators, and assigns, for the term of —— years, to be computed from the day of the date of these presents, without impeachment of waste, by way of mortgage, for securing to the said C. D., his executors, administrators, and assigns, the repayment of the said sum of £——, on the —— day of —— now next ensuing, with interest for the same in the meantime, at the rate of £—— per cent., per annum;

—and to enter into usual mortgage covenants,

And will enter into a covenant with the said C. D., by way of collateral security, for the payment of the said sum of £——, and interest; And also into proper and usual covenants for the right of him, the said A. B., to charge and mortgage the said premises in manner aforesaid, and for further assurance;

—and to do all acts necessary for further assurance.

And further, that he, the said A. B., will, at his own costs and charges, make, do, and execute, or cause, and procure to be made, done, and executed, all such acts, deeds, and assurances in the law, whatsoever, for effecting the purposes aforesaid, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably devised, advised, or required. IN WITNESS &c. (*a*).

Agreements to exercise powers.

(*a*) Contracts, or agreements to execute powers, are, in equity, considered as defective executions, and will, like them, be aided, if there be a sufficient consideration. "The same rules," says Sir E. Sugden, (2 Powers, 127), "apply to each case. As against a remainderman, both are equally binding. The principal distinctions between them are, that a contract to execute a power might be enforced against the donee of the power himself, where a defective execution, without any contract, although capable of being enforced against the remainderman, could not be aided against the party who made it."

XIV.

FOR SETTLING THE CONSTRUCTION OF A WILL.

AGREEMENT *for settling the true* CONSTRUCTION *of an obscure* WILL *and* CODICILS, *so as to enable the* EXECUTORS *and* TRUSTEES *to* CARRY *the* TRUSTS *thereof into* EXECUTION, WITHOUT *the aid of a* COURT *of* EQUITY—*some of the Cestui que Trusts being* MARRIED WOMEN, *and one, (though twenty-one years of Age), not having attained a* VESTED INTEREST *in the Funds* (*a*).

THIS INDENTURE, made &c. BETWEEN C. B., of &c., D. E., of &c., and F. E. his wife, (formerly F. B. spinster), Parties.

Now, it is settled, that a defective execution will be aided in favour of a purchaser, mortgagee, or lessee; (see the cases collected, 2 Sugd. Pow. 100; 2 Chance on Powers, 494); and, therefore, it follows, that an agreement to exercise a power of sale, or charging, or leasing, will also be aided, although wanting in the formalities required by the power. (See 2 Sugd. Pow. 127, 135). And the general rule is, that an agreement to execute a power, will always be enforced, and aided, if there be a sufficient consideration; that is, if the object be the benefit, either of a purchaser, mortgagee, creditor, lessee, wife, or child, or of a charity. (See Sugd. Pow. ch. 10, ss. 1, 2, 3; Chance on Powers, ch. 23, ss. 1, 2).

Most of the cases as to agreements to exercise powers have arisen as to powers of jointuring, and there does not appear to be any case expressly as to a power of charging. But there can be no doubt, that agreements to execute powers of charging would be enforced and aided. (See Lord Redesdale's Observations, 1 Scho. & Lef. 60, 62, 63; 2 Ball & Beatty, 44).

It is, however, extremely undesirable to leave any matter open to dispute; and, therefore, care should always be taken, that agreements to execute powers should be themselves executed and attested in the manner which the power requires. (See *Mortlock* v. *Buller*, 10 Ves. 292).

(*a*) It must be understood, that this precedent is given, not as a form which can be used in framing other instruments, but as a

FOR SETTLING THE CONSTRUCTION OF A WILL.

G. H., of &c., and I. H. his wife, (formerly I. B. spinster), and A. B., of &c., (which said C. B., F. E., I. H. and A. B., are the only children now living of C. B., Esq., deceased, the only son of A. B., late of &c., now deceased, and are the only next of kin of L. B., deceased, another child of the said C. B. deceased), M. B., of &c., spinster, N. P., of &c., and Q. P., of &c., (formerly Q. B. spinster), and R. S., of &c., and T. S. his wife, (formerly T. B. spinster), which said M. B., Q. P., and T. S., are the only daughters of the said A. B., deceased; and are, together with the said children of the said C. B., deceased, the only next of kin of the said A. B., deceased), of the one part; and the said N. P., G. H., and C. B., party hereto, (the executors named in and appointed by the will of the said A. B., deceased), of the other part: WHEREAS the said A. B. and C. B., deceased, carried on business as merchants, in copartnership, down to the time of the death of the said C. B., deceased: AND WHEREAS the said C. B., deceased, duly signed and published his last will and testament in writing, bearing date the 31st day of May, 1827, and thereby left all his property in the said copartnership at the disposal of the said A. B., deceased, and appointed him sole executor of the said will: AND WHEREAS the said C. B. died on the 27th day of December, 1833, without having altered or revoked his said will, so far as the same related to the property of the said copartnership, and the said appointment of executor; and the same will was proved by the said A. B., deceased, on the 24th day of February, 1824, in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS the said C. B., deceased, left V. B. his widow, and the said C. B., party hereto, F. E., I. H., A. B., party hereto, and L. B., and no other child him surviving: AND WHEREAS the said A. B., deceased, duly made, signed, and published his last

Recites that A. B. and C. B., deceased, were co-partners;

—that C. B. left, by will, his co-partnership property to A. B.;

—death of C. B., and probate of his will;

—that he left a widow and certain children;

—will of A. B., deceased.

specimen of the kind of instrument required for carrying into effect family arrangements. It is of considerable length, and will require much attention, before it is fully comprehended; but as it was prepared with much care, and was settled in consultation by two of the most eminent conveyancers of the present day, it has been thought well to include it in this Collection.

FOR SETTLING THE CONSTRUCTION OF A WILL.

will and testament in writing, bearing date the 1st day of January, 1834, and after therein noticing, that, by the death of the said C. B., deceased, whom he had appointed his sole executor, that appointment had ceased, he thereby appointed the said N. P., G. H., and C. B., party hereto, his (the said testator's) executors; and the said testator gave the whole of the properties he might be possessed of or entitled to, belonging to his said deceased son, so far as he, the said testator, had power under the will of his said son, to the said N. P., G. H., and C. B., party hereto, in trust, (to the full extent of his said son's property), for the purposes in the said will now in recital mentioned; and the said testator, by his said will, declared that his own property he should dispose of to the children of his said son, and the children of his daughter, the said T. S., and some bequests to others, as he, the said testator, should thereafter name and set forth; *and the said testator, among other bequests, bequeathed to his said daughter, the said T. S., the sum of £1,000 3l. per cent. consols, to be added to her marriage settlement;* and the said testator then gave various other legacies, and further directed, that a sufficient sum might be invested in the public funds, or some other security, that the interest thereof might enable his executors to pay the rent from time to time accruing due, which he, the said testator, and his said son, the said C. B., deceased, by lease, had engaged to do, in respect of some property at ——; and with respect to the remainder of his, the said testator's, property, (not disposed of otherwise), he directed that the same should be distributed by his executors, *amongst his grandchildren with equity and justice, one half thereof amongst the children of his late son, the said C. B., deceased, and the other amongst the children of his daughter, the said T. S.:* AND WHEREAS the said A. B., deceased, duly made, signed, and published a codicil, bearing date the 2nd day of January, 1834, to his said will, and thereby, in respect to the bequest of his residuary property to his grandchildren, directed, *that they should each attain a vested interest therein, only as they might respectively attain the age of twenty-three years, or*

One of the points in dispute.

Another of the points in dispute.

Recites codicil to will of A. B.

Point in dispute.

FOR SETTLING THE CONSTRUCTION OF A WILL.

be married with the consent of their respective parents or guardians: AND WHEREAS the said A. B., deceased, duly made, signed, and published a codicil, bearing date the 16th day of April, 1834, to his said will, and thereby declared his intention as to certain dispositions and appropriations, therein mentioned to have been made by him, of certain parts of the property of the said C. B., deceased: AND WHEREAS the said A. B., deceased, after the date and execution of his said will and codicil, transferred the sum of £3,000 3*l.* per cent. consolidated bank annuities into the names of the trustees of the settlement made and executed on the marriage of the said T. S. with the said R. S., to be by them held and applied upon and for the trusts, intents, and purposes by the said settlement declared, of certain parts of the funds therein comprised: AND WHEREAS the said A. B., deceased, also tranferred the sum of £2,500 3*l.* 10*s.* per cent. bank annuities, into the names of the said trustees, to be by them held and applied upon certain trusts, for the benefit of six children of the said R. S. and T. S.: AND WHEREAS the said A. B., deceased, duly made, signed, and published another codicil, bearing date the 8th day of May, 1834, to his said will, and thereby, after mentioning that he had, since the execution of his said will, transferred to the trustees of his said daughter T. S.'s marriage-settlement, the said sum of £3,000 3*l.* per cent. consolidated bank annuities, to follow the purposes directed therein; and that he had further transferred to the said trustees the said sum of £2,500 3*l.* 10*s.* per cent. bank annuities, for the benefit of six grand-children, the sons and daughters of his said daughter, T. S., by her husband, the said R. S., as was directed by a separate deed of trust executed by him, the said testator, in their favour, the said testator did thereby declare it to be his will, and directed, that the said two respective amounts of stock were to be considered as part of the share or proportion he had directed by his said will to pass for the benefit of his said daughter, T. S., and her children; and that a full equal share of his property, (in addition to the whole of any property that might have accrued to him, or that there-

Recites another codicil to will of A. B.

That A. B. afterwards transferred £3,000, consols, to the trustees of his daughter T. S.'s settlement,

—and also £2,500, three and a-half per cents., for his daughter T. S.'s children.

Recites further codicil to will of A. B.

FOR SETTLING THE CONSTRUCTION OF A WILL.

after might accrue to him from the will of his late son, the said C. B., deceased, the whole proceeds arising from which were to be exclusively for the benefit of the children of his said late son, as directed by his, the said testator's, will, or intended so to be, or by the codicil theretofore executed by him, for the purpose of directing the same), was to be first taken by or amongst the children of the said C. B., deceased, before the said T. S., or her children, should be entitled to any further amount in respect thereof; and further, that the same rule should be followed, in respect of any further amount of stock or money he, the said testator, might thereafter appoint, for the exclusive benefit of the said T. S., or her children: AND WHEREAS the said A. B., deceased, died on the 3rd day of January, 1836, without having altered or revoked his said will, except in so far as the same was altered by his said codicils, and without having altered or revoked his said codicils, or any of them, so far as relates to the arrangement intended to be effected by these presents: AND WHEREAS the said wills and codicils were duly proved by the said N. P., G. H., and C. B., party hereto, on the 20th day of January, 1836, in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS the said C. B., party hereto, F. E. and I. H., attained their age of twenty-three years, in the lifetime of the said A. B., deceased; and the said A. B., party hereto, had attained his age of twenty-one years, but was under the age of twenty-three years; and the said L. B. was an infant, under the age of twenty-one years, at the time of the death of the said A. B., deceased: AND WHEREAS all the said six children of the said T. S. are still living: AND WHEREAS the said C. B., party hereto; F. E., I. H., A. B., party hereto, and L. B., the children of the said C. B., deceased; and the said M. B., Q. P., and T. S., the children of the said A. B., deceased, were the persons living at the time of the death of the said A. B., deceased, who would have been entitled to his personal estate under the statutes for the distribution of the personal estate of intestates, in case he had died intestate: AND WHEREAS the said N. P., G. H., and C. B., party hereto, paid the funeral and tes-

—death of A. B.

—probate of the wills and codicils of A. B.

—ages of the children of C. B. at the death of A. B.

—the six children of T. S. are living,

—the persons who were next of kin to A. B. at his death;

—that the trustees transferred £1,000 consols

FOR SETTLING THE CONSTRUCTION OF A WILL.

tamentary expenses and debts of the said A. B., deceased, and the legacies given by his said will and codicils, and at the request, and by the direction, of the said R. S. and T. S., transferred the said sum of £1,000 *3l.* per cent. consolidated bank annuities, part of the personal estate of the said testator, into the names of the trustees of the said marriage-settlement of the said T. S., in satisfaction and discharge of the said legacy of £1,000 *3l.* per cent. consolidated bank annuities, by the said will of the said A. B., deceased, bequeathed to the said T. S., to be added to her marriage-settlement: AND WHEREAS the said N. P., G. H., and C. B., party hereto, in pursuance of the directions in that behalf contained in the said recited codicil of the 8th day of May, 1834, retained and appropriated the several sums of £3,000 *3l.* per cent. consolidated bank annuities, and £2,500 *3l.* 10*s.* per cent. bank annuities, out of the said residuary personal estate of the said A. B., deceased, for the benefit of the children of the said C. B., deceased, and paid and divided three equal fifth parts of the same sums amongst the said C. B., party hereto, F. E., and I. H., equally, and retained the remaining two equal fifth parts of the same sums, amounting to the sums of £1,200 *3l.* per cent. consolidated bank annuities, and £1,000 *3l.* 10*s.* per cent. bank annuities, in their own names, in trust, to answer the expectant shares of the said A. B., party hereto, and L. B.: AND WHEREAS, after payment of the funeral and testamentary expenses, and debts and legacies, and such last-mentioned retainer and appropriation, there remained a large surplus or residue of the personal estate of the said A. B., deceased, in the hands of his said executors: AND WHEREAS the said N. P., G. H., and C. B., party hereto, have appropriated the sums of £9,000 *3l.* per cent. reduced bank annuities, and £1,800 new *3l.* 10*s.* per cent. bank annuities, part of the said residuary personal estate of the said A. B., deceased, in equal moieties or shares, for the said children of the said C. B., deceased, and the said children of the said T. S.: AND WHEREAS the said N. P., G. H., and C. B., party hereto, paid three equal fifth parts of the said moiety or

—to the trustees of the settlement of T. S. in pursuance of the will of A. B. —that the trustees retained and paid other sums for the children of C. B.

—that surplus remained in hands of executors;

—that trustees have made further appropriations, in equal moieties, for the children of C. B. and T. S.;

—and paid vested shares of children of

share so appropriated for the children of the said C. B., deceased, of the said sums of £9,000 *3l.* per cent. reduced bank annuities, and £1,800 new *3l.* 10*s.* per cent. bank annuities, unto and amongst the said C. B., party hereto, F. E., and I. H., equally, and retained the remaining two equal fifth parts, amounting together to the sums of £1,800 *3l.* per cent. reduced bank annuities, and £360 new *3l.* 10*s.* per cent. bank annuities, in their names in trust, to answer the expectant shares of the said A. B., party hereto, and L. B.: AND WHEREAS the said N. P., G. H., and C. B., party hereto, transferred one equal sixth part of the said moiety or share, so appropriated for the children of the said T. S., of the said sums of £9,000 *3l.* per cent. reduced bank annuities, and £1,800 new *3l.* 10*s.* per cent. bank annuities, to or for one of the said children, who had attained her age of twenty-three years, and transferred one other equal sixth part thereof to or for another of the said children, who had married under that age with the consent of her parents, and retained the remaining four equal sixth parts, amounting to the sums of £3,000 *3l.* per cent. reduced bank annuities, and £600 new *3l.* 10*s.* per cent. bank annuities, in their names in trust, to answer the expectant shares of the children of the said T. S., who are under the age of twenty-three years and unmarried: AND WHEREAS large sums of money and other property, further part of the residuary personal estate of the said A. B., deceased, still remain to be disposed of and applied according to the directions contained in the said will and codicils of the said A. B., deceased: AND WHEREAS the said V. B. died on the 24th day of February, 1835; and the said L. B. died on the 5th day of September, 1836, without having been married and intestate, and letters of administration of her goods and chattels, rights and credits, have been granted to the said C. B., party hereto, by the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS the said C. B., party hereto, F. E., I. H., and A. B., party hereto, are the persons entitled to the personal estate of the said L. B., deceased, under the statutes for the dis-

FOR SETTLING THE CONSTRUCTION OF A WILL.

C. B., and retained the others.

—and similarly for the children of T. S.;

—that considerable property of A. B. is still undisposed of;

—death of V. B.;—death of L. B., intestate and sole;

—administration to L. B.;

—next of kin of L. B.;

FOR SETTLING THE CONSTRUCTION OF A WILL.

tribution of the personal estate of intestates: AND WHEREAS doubts have arisen whether the said legacy of £1,000 *3l.* per cent. consolidated bank annuities, by the said will of the said A. B., deceased, given to the said T. S., to be added to her marriage-settlement, was not satisfied by the said A. B., deceased, having, subsequently to the date of his said will, transferred the said sum of £3,000 like annuities into the names of the trustees of her said settlement; and whether, in consequence of the said legacy having been so satisfied, the said transfer of £1,000 like annuities, hereinbefore mentioned to have been made to the trustees of the said settlement, in satisfaction of the said legacy by the said executors of the said A. B., deceased, was not improper and chargeable as a misapplication of the assets of the said testator (*b*): AND WHEREAS doubts have also arisen whether the said sums of £3,000 *3l.* per cent. consolidated bank annuities, and £2,500 *3l.* 10*s.* per cent. reduced bank annuities, by the said codicil of the 8th day of May, 1834, directed to be taken by or amongst the children of the said C. B., deceased, as aforesaid, were to be taken by them as

—doubt has arisen, whether the legacy to the settlement of T. S. was not satisfied by the subsequent transfers, by the testator, to the trustees of the settlement.

—and whether the bequests of specific sums to the children of C. B. were to be taken by them as legacies or residue;

Ademption of legacies by advancement of portions.

(*b*) It is the doctrine of the courts of equity, that where a father, or a person *in loco parentis*, gives a legacy to a child, the legacy must be understood as a portion, though it is not so described in the will. And if the testator afterwards advance a portion for that child, such advance is to be presumed to be an ademption of the legacy, although there may be slight circumstances of difference between that advance and the legacy; and although the advance and legacy may be of different amount. (*Ex parte Pye*, 18 Ves. 140; 2 Williams' Law of Executors, 827; 1 Roper on Legacies, 325; *Carver* v. *Bowles*, 2 Russ. & My. 301; *Sheffield* v. *Earl of Coventry*, Id. 317; *Powys* v. *Mansfield*, 6 Sim. 528, reversed 3 My. & Cra. 359). Parol evidence of the testator's intention is admissible, either to rebut or confirm the presumption. (*Trimmer* v. *Bayne*, 7 Ves. 503; *Robinson* v. *Whitley*, 9 Ves. 577; *Thellusson* v. *Woodford*, 4 Mad. 420; see, too, the cases, &c. before cited; and *Weall* v. *Rice*, 2 Russ. & My. 251; *Booker* v. *Allen*, Id. 270; *Lloyd* v. *Harvey*, Id. 310).

As to who may stand to the child in loco parentis, see 1 Will. Executors, 827; 1 Roper on Legacies, 330, et seq.; *Booker* v. *Allen*, ubi supra; *Powys* v. *Mansfield*, ubi supra; *Rogers* v. *Soutten*, 1 C. P. Cooper, 96).

a legacy, to be vested in and payable to them at the death of the said testator, or were to be taken by them as part of their share of the residuary estate of the said A. B., deceased, and to be subject to the same directions as to the age or time at which their respective shares thereof should vest respectively, and the same incidents in every respect, to which their share of the said residuary estate is subject and liable: AND WHEREAS doubts have also arisen whether the effect of the said will and first codicil of the said A. B., deceased, was to divide the respective moieties of his said residuary estate into as many shares respectively as there should be children of the said C. B., deceased, and T. S. respectively, living at the death of the said testator, and to leave undisposed of such and so many of the said shares as should fail to become vested according to the conditions of the said codicil (*c*), or whether the effect of the said will and codicil was to constitute each moiety of the said residuary estate an entire fund to be divisible amongst all such and so many of the said children of the said C. B., deceased, and T. S. respectively, as had attained, or should attain the age of twenty-three years, or had been or should be married with such consent as aforesaid: AND WHEREAS it has also been doubted whether the gift of the said moiety of the said residuary estate to the children of the said T. S. might not, by the effect of the said codicil, in postponing the time of vesting thereof, be rendered void for remoteness (*d*):

FOR SETTLING THE CONSTRUCTION OF A WILL.

—and as to the effect of the disposition made of the residue;

—and as to validity of gift to children of T. S.;

(*c*) There cannot be much doubt on the point mentioned in this recital, as, in fact, the effect of the will and codicil seems to be the same as that of the common trust in settlements for all the children, the shares to vest at twenty-one. A clause of survivorship, giving the shares of those who die under twenty-one amongst the survivors, is always deemed needful after such a trust, it being considered that the effect of the trust standing alone is to divide the fund into as many shares as there are children born, and that such shares respectively vest only on the children who are respectively entitled to them attaining twenty-one. Consequently, the shares of those who die under twenty-one are undisposed of in the absence of the survivorship clause.

Effect of a trust for all children born, the shares to be vested at twenty-one.

(*d*) As the codicil referred to in the text postpones the vesting of the shares of the children of T. S. until they attain the age of twenty-

Effect of postponing the

FOR SETTLING THE CONSTRUCTION OF A WILL.

AND WHEREAS, for the purpose of obviating the inconveniences arising from the aforesaid doubts, and of enabling the said executors of the said A. B., deceased, safely to administer and divide his estate and effects according to the construction which the said parties hereto have agreed shall be considered the true construction of the said will and codicils of the said A. B., deceased, it has been agreed, that the said several persons, parties to these presents, shall enter into and make the agreements and declarations hereinafter contained, and that the said D. E., A. B., party hereto, M. B. and R. S., should enter into such covenants with the said N. P., G. H., and C. B., party hereto, as are hereinafter contained, and that the said N. P., G. H., and C. B., party hereto, respectively, should enter into such covenants with the others and other of them as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared between and by the parties to these presents, that the said legacy of £1,000 *3l.* per cent. consolidated bank annuities, by the said will of the said A. B., deceased, given to the said T. S. to be added to her marriage settlement, was not satisfied by

—and agreement to settle the construction to be put on the will.

Witnesseth agreement and declaration, that legacy to settlement of T. S. was not satisfied.

—and was properly paid by the executors of A. B.

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vesting of the shares till the age of twenty-three.

three years, it seems that the gift of those shares is void for remoteness, the vesting being in fact postponed for a life in being, and more than twenty-one years afterwards. (*Leake* v. *Robinson*, 2 Mer. 363; *Vawdry* v. *Geddes*, 1 Russ. & My. 203; see, however, *Bland* v. *Williams*, 3 My. & Ke. 411). The gift being to all the children of T. S. as a class, if void as to any is void as to all, although the postponement of vesting would have been good as to such of the children of T. S. as were born in the testator's lifetime, if there had been a separate gift to them. (See the above cases). But as the rule of law in gifts of this nature is, that the postponement of the vesting till a particular age, lets in all the children born before the eldest child attains that age; in the case in the text, every child born before the eldest attained twenty-three, would be entitled to a share, and, consequently, the vesting would, as before mentioned, be postponed longer than the rules in respect to perpetuities allow. (*Davidson* v. *Dallas*, 14 Ves. 576; *Whitbread* v. *St. John*, 10 Ves. 152; *Gilbert* v. *Boorman*, 11 Ves. 238; *Scott* v. *Harwood*, 5 Madd. 332; *Titcomb* v. *Butler*, 3 Sim. 417). It is, too, very possible to maintain that the effect of the first codicil was to postpone the vesting of the respective shares till the children respectively attained twenty-three.

FOR SETTLING THE CONSTRUCTION OF A WILL.

the said A. B., deceased, having, subsequently to the date of his said will, transferred the said sum of £3,000 like annuities into the names of the trustees of the said settlement, and that the said transfer of £1,000 like annuities, hereinbefore mentioned to have been made by the said executors of the said A. B., deceased, to the trustees of the said settlement in satisfaction of the said legacy, was properly made and in conformity with the will of the said A. B., deceased: AND IT IS HEREBY further agreed and declared between and by the parties to these presents, that the said sums of £3,000 *3l.* per cent. consolidated bank annuities, and £2,500 *3l.* 10*s.* per cent. reduced bank annuities, by the said codicil of the 8th day of May, 1834, directed to be taken by or amongst the children of the said C. B., deceased, as aforesaid, were and are to be taken by them as part of their share of the residuary estate of the said A. B., deceased, and are to be subject to the same directions as to the age or time at which their respective shares thereof should vest respectively, and to the same incidents in every respect to which their share of the said residuary estate is subject and liable: AND IT IS HEREBY further agreed and declared between and by the parties to these presents, that the effect of the said will and first codicil of the said A. B., deceased, was to give one moiety or equal half part of his said residuary estate, unto and amongst all such and so many of the children of the said C. B., deceased, as were living at the death of the said A. B., deceased, and had attained or should attain their ages of twenty-three years, or had been or should be married with consent as aforesaid, and to give the other moiety or equal half part of his said residuary estate, unto and amongst all such and so many of the children of the said T. S. as were living at the death of the said A. B., deceased, and had attained or should attain their ages of twenty-three years, or had been or should be married with such consent as aforesaid: AND IT IS HEREBY further agreed and declared that the payments hereinbefore mentioned to have been made to the said C. B., party hereto, F. E. and I. H., of their shares of the said sums of £3,000 *3l.* per cent. consolidated bank

Agreement and declaration, that the specific bequests to the children of C. B. are to be taken by them as residue.

Agreement and declaration as to what is to be deemed the disposition made by the will and codicil of A. B. of his residuary estate.

Agreement and declaration, ratifying the appropriation made for the children of C. B., and declaring the

FOR SETTLING THE CONSTRUCTION OF A WILL.

trusts of the parts which had been retained.

annuities, and £2,500 *3l.* 10*s.* per cent. reduced bank annuities, and of their shares of one moiety or equal half part of the said sums of £9,000 *3l.* per cent. reduced bank annuities, and £1,800 new *3l.* 10*s.* per cent. bank annuities, and of the shares of the said two children of the said T. S. of the other moiety of the said sums of £9,000 *3l.* per cent. reduced bank annuities, and £1,800 new *3l.* 10*s.* per cent. bank annuities, were properly made, and in conformity with the will and codicils of the said A. B., deceased; and that the said N. P., G. H., and C. B., party hereto, their executors, administrators, and assigns, shall stand and be possessed of and interested in the said several sums of £1,200 *3l.* per cent. consolidated bank annuities, £1,000 *3l.* 10*s.* per cent. reduced bank annuities, £1,800 *3l.* per cent. reduced bank annuities, and £360 new *3l.* 10*s.* per cent. bank annuities hereinbefore mentioned to have been retained by them the said N. P., G. H., and C. B., party hereto, and of and in all the dividends and annual proceeds of the said several sums upon the trusts following; (that is to say), as to three equal eighth parts (*e*) of the said funds, stocks, dividends, and proceeds, in trust for the said C. B., party hereto, F. E., and I. H., and their respective executors, administrators, and assigns, equally as tenants in common, and as to the remaining five equal eighth parts of the said funds, stocks, dividends, and proceeds, in case the said A. B., party hereto, shall attain his age of twenty-three years, or marry with consent as aforesaid, then in trust for the said A. B., party hereto, his executors, administrators, and assigns, but in

(*e*) It may be necessary to explain this division into parts. The funds which had been thus retained were, it will be recollected, retained in trust to answer the expectant equal shares of L. B. and A. B., the parties. But L. B. having died, her share becomes divisible into fourths between her brothers and sisters. Therefore, on the whole, A. B. is entitled to his own half, that is four-eighths of the entire fund, and to a fourth of L. B.'s half, i. e. an eighth of the entire fund, i. e. five-eighths altogether. The other brother C. B., and the sisters F. E. and I. H., are each entitled to a fourth of L. B.'s half, that is to an eighth of the whole, so that three-eighths are divisible amongst them equally.

FOR SETTLING THE CONSTRUCTION OF A WILL.

case the said A. B., party hereto, shall not attain his age of twenty-three years, nor marry with consent as aforesaid, then in trust for the said C. B., party hereto, F. E., and I. H., and their respective executors, administrators, and assigns, equally as tenants in common: AND IT IS HEREBY further agreed and declared that the said N. P., G. H., and C. B., party hereto, their executors, administrators, and assigns, shall stand and be possessed of and interested in the said sums of £3,000 *3l.* per cent. reduced bank annuities, and £600 new *3l.* 10*s.* per cent. bank annuities hereinbefore mentioned to have been retained by them the said N. P., G. H., and C. B., party hereto, and of and in the dividends and annual proceeds thereof, in trust for all such and so many of the said six children of the said T. S. as shall attain their age of twenty-three years, or be married with such consent as aforesaid, but so that neither of the children of the said T. S. who have already received their shares of the moiety of the said sums of £9,000 *3l.* per cent. reduced annuities, and £1,800 new *3l.* 10*s.* per cent. bank annuities shall have or be entitled to any share of or in the said sums of £3,000 *3l.* per cent. reduced bank annuities, and £600 new *3l.* 10*s.* per cent. bank annuities, or either of them, without bringing the share or shares already received by them as aforesaid into hotchpot, and accounting for the same accordingly: AND IT IS HEREBY further agreed and declared between and by the parties to these presents, that the said N. P., G. H., and C. B., party hereto, their executors, administrators, and assigns, shall stand and be possessed of, and interested in, all and singular the residue of the personal estate of the said A. B., deceased, not appropriated or disposed of for the purposes aforesaid, and of and in all monies to arise or be produced by the same and every part thereof, and of and in the stocks, funds, and securities, in or upon which the same may be invested, and the interest, dividends, and annual proceeds thereof, upon the trusts following; (that is to say), as to one moiety or equal part of the said trust monies, stocks, funds, and securities, interest, dividends, annual proceeds, and accu-

Agreement and declaration as to the funds retained for the children of T. S.

Agreement and declaration as to the unappropriated residue.

As to one moiety.

FOR SETTLING THE CONSTRUCTION OF A WILL.

mulations in trust, for all such and so many of them, the said C. B., party hereto, F. E., I. H., and A. B., party hereto, as have attained, or shall attain their age of twenty-three years, or have married, or shall marry, with such consent as is required by the said codicil of the 2nd day of January, 1834, in equal shares and proportions as tenants in common; and as to the other moiety or equal half-part of the said trust monies, stocks, funds, and securities, interest, dividends, annual proceeds, and accumulations, in trust, for all such and so many of the said six children of the said T. S., living at the death of the said A. B., deceased, as have attained or shall attain their age of twenty-three years, or have married or shall marry with such consent as is required by the said codicil of the 2nd day of January, 1834, in equal shares and proportions as tenants in common: AND EACH of them the said D. E., A. B., party hereto, M. B. and R. S., so far as relates to his and her own acts and deeds, and the acts and deeds of his and her executors and administrators, and the said D. E. and R. S., also, so far as relates to the acts and deeds of their respective wives (*f*), (both during coverture, and after they may

As to the other moiety.

Several covenants, by all parties, for themselves and wives, with the executors, to fulfil the arrangement.

Reasons for introducing the covenants in the text.

(*f*) These covenants are of very little value as regards the acts of the covenantors themselves; the whole transaction is of an equitable nature, and the preceding agreement is quite as effectual in binding all the parties who are under no disability as any covenant could be. But considerable parts of the testator's assets were not realised so as to be divisible among the legatees at the date of the agreement; and the married women would only be bound with respect to such parts of the property as should be reduced into possession during their coverture. If they survived their husbands, they could set aside the agreement, so far as it affected any of the testator's property which remained outstanding at the deaths of their husbands. Hence, it became necessary to secure their concurrence by obtaining covenants from the husbands for the ratification of the agreement by their respective wives; and these covenants were extended to the form given in the text, in order that they might likewise serve as covenants for further assurance.

Assignments, by the husband, of the wife's choses in action.

For the full understanding of the preceding remarks, it will be needful to explain the law with respect to the interest of the husband and his assigns, in the choses in action of the wife.

The leading principle on the subject is thus stated by Lord Coke

have become discovert); and of the executors and administrators of their respective wives, doth hereby, for himself

FOR SETTLING THE CONSTRUCTION OF A WILL.

(Co. Lit. 351. b.). "Marriage is an absolute gift of all chattels personal in possession in the wife's own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them." Thus, where a chose in action of the wife is sought to be bound by a decree in equity, if the husband dies before the thing ceases to be a chose in action, that is, before there is an order for payment of the money, the surviving wife is entitled. (*Nanney* v. *Martin*, 1 Cha. Ca. 27; see, however, infra, as to what is a reduction into possession). If a husband become bankrupt or insolvent, and die before his wife, the interest in a sum of money belonging to the wife, but which is not reduced into possession during the husband's life, does not go to the assignees, but survives to the wife. (*Grey* v. *Kentish*, 1 Atk. 280; S. C. 1 P. Wms. 459, Cox's Note; *Gayer* v. *Wilkinson*, 1 Bro. C. C. 50, n.; 2 Dick. 492; *Mitford* v. *Mitford*, 9 Ves. 87; *Hornsby* v. *Lee*, 2 Mad. 16). But it was long supposed, that, although the law was thus established with respect to the rights of the husband and his general assignees; yet, that a particular assignee for a valuable consideration of the specific chose in action acquired a new right, superior to that of the wife by survivorship: in fact, that the assignment by the husband operated as a reduction into possession. There seems to be no principle on which this doctrine can be maintained; and, it is now well settled, that an assignment by the husband of his wife's choses in action is not binding on the wife if he die before her, and without having reduced them into possession. (*Hornsby* v. *Lee*, 2 Mad. 16; *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65; *Watson* v. *Dennis*, 3 Russ. 90; *Stamper* v. *Barker*, 5 Mad. 157). And, of course, it is of no avail, that the wife executes the assignment, because the assignment is treated as and is simply a contract, and the wife, being under disability, is unable to bind herself by contract. (See the cases above).

Wife's equity to a settlement, out of her choses in action, cannot be destroyed.

And as the wife's claim, by survivorship, to her choses in action, cannot be affected till they are reduced into possession; so neither can the equity which she has to a settlement out of such part of her property as the husband cannot reach without the aid of a court of equity, be destroyed. (*Pope* v. *Crashaw*, 4 Bro. C. C. 326; *Worrall* v. *Marlar*, 1 Cox, 153; 1 Cox's P. Wms'. Note (1), p. 458; *Earl of Salisbury* v. *Newton*, 1 Eden, 370; *Kensington* v. *Dollond*, 2 My. & Ke. 184; *Ex parte O'Ferrall*, 1 Glyn & Jam. 347; *Ex parte Thompson*, 1 Deac. 90). And this (as will be seen from the cases) holds good, both against the assignees in bankruptcy and insolvency of the husband, and against his particular assignees, except in one case: that is, where an equitable life-interest is given to the

FOR SETTLING THE CONSTRUCTION OF A WILL.

and herself, his and her heirs, executors, and administrators, covenant with the said N. P., G. H., and C. B., party

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wife, the husband, or his particular assignee, for valuable consideration, is permitted to enjoy it without the consent of the wife, and without making any provision for her. (*Elliott* v. *Cordell*, 5 Mad. 149; *Stanton* v. *Hall*, 2 Russ. & My. 180). But, as this right depends on the supposed ability of the husband to support the wife, if that ability obviously ceases at the date of the act of assignment, i. e. if the husband become bankrupt or insolvent, the wife's equity to a settlement arises against the general assignees. (*Elliott* v. *Cordell*, ubi supra, and cases there cited).

Wife's equity personal to herself.

The equity to a settlement is, however, personal to the wife; and, although the settlement usually ordered includes a provision for the children, yet the wife may waive the right without any regard to their interest. (*Murray* v. *Lord Elibank*, 10 Ves. 84; S. C. 13 Ves. 1; *Fenner* v. *Taylor*, 2 Russ. & My. 190; *In the matter of Anne Walker*, Lloyd & Goold, 299; see, however, *Barker* v. *Lee*, 6 Mad. 330; the children have no equity if the wife be dead; *Scriven* v. *Tapley*, 2 Eden. 337; S. C. Amb. 509; or if she have gained the whole interest by survivorship; *Johnson* v. *Johnson*, 1 Jac. & Walk. 472). But, if the wife assert her claim and die without abandoning it, the children have a good claim to a settlement. (*Steinmetz* v. *Halthin*, 1 Glyn & Jam. 64; *Johnson* v. *Johnson*, 1 Jac. & Walk. 479; *Groves* v. *Clark*, 1 Keen, 132; S. C. 6 Sim. 584; *Lloyd* v. *Williams*, 1 Mad. 450).

Wife's equity may be barred by antenuptial contract,

—or payment to the husband.

The wife's equity may be barred by a settlement made before marriage, and containing a contract to that effect; (*Salwey* v. *Salwey*, Amb. 692, Blunt's Edition; and the cases cited, note (2); *Garforth* v. *Bradley*, 2 Ves. Senr. 675; *Lady Elibank* v. *Montolieu*, 5 Ves. 737); or by the trustee of the fund having paid the fund to the husband before any suit has been instituted. (10 Ves. 90, 4 Ves. 18). It is unnecessary here to refer to the cases which bear on the amount or proportion of the property which the wife can require; but it may be observed, that in no case has she any claim to the whole. (*Wright* v. *Morley*, 11 Ves. 12; *Beresford* v. *Hobson*, 1 Mad. 362, 379; *Ex parte Thompson*, 1 Deac. 90).

No separate examination of a married woman taken to pass her choses in action.

A court of equity will not permit a wife, by means of a separate examination, to pass her interest, or bar her equity in a fund which is reversionary, or not reduced into possession, or is unascertained; (*Richards* v. *Chambers*, 10 Ves. 580; *Pickards* v. *Roberts*, 3 Mad. 584; *Woollands* v. *Crowcher*, 12 Ves. 174; *Wade* v. *Saunders*, Turn. & Russ. 306); although, before the statute 3 & 4 Will. 4, c. 74, the reversionary interest of a married woman in real estate might have been barred by a fine, even where that interest was contingent.

Married wo-

Since the statute, it is clear, that a married woman may, by virtue of

hereto, and each of them, their and each of their executors and administrators, that they the said D. E., F. E., FOR SETTLING THE CONSTRUCTION OF A WILL.

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the 77th section, convey a vested reversionary interest. (*Ex parte Gill*, 1 Bing. N. C. 168*). But, as a contingent interest can no longer be conveyed by any means, except in equity, as a matter of contract, it is doubtful whether a married woman can now dispose of a contingent interest, as it is not clear, whether the 77th section of the act gives a married woman power to contract as a feme sole. The Irish act, 4 & 5 Will. 4, c. 92, s. 22, enables contingent interests in real estate in Ireland to be conveyed by deed like other reversionary interest. man's power to dispose of a contingent reversion in real estate.

An important decision, which follows directly from the principles laid down in the former part of this note, has recently been reported; namely, that if an annuity or a life-interest in personalty be given to a married woman, and be not settled, for her separate use, neither she nor her husband can effectually dispose of her entire life-interest, because she may outlive her husband, and then, as to such part of it as would be enjoyed by her after the coverture determined her interest, would be reversionary only. (*Stiffe* v. *Everitt*, 1 My. & Cra. 37). But, in this case, or in the case of *Richards* v. *Chambers*, (ubi supra), where the wife's equity to a settlement cannot arise, there will be no difficulty in disposing of her interest, because the event of her outliving her husband, and repudiating the disposition, may be guarded against, by effecting appropriate insurances. In the cases where the wife's equity to a settlement arises, the only way in which a disposition of the wife's choses in action can be effected, is by taking a covenant from the husband, that she shall ratify the disposition. This is the mode pursued in the text, and is sufficiently available in cases in which the covenant of the husband is one which can be relied on for furnishing a proper indemnity. Wife's entire life-interest in personalty cannot be disposed of. Mode of dealing with the interests of married women.

Of course, if an annuity or life-interest be given to the separate use of a married woman, and she be not restrained from anticipation, she can dispose of it in her husband's lifetime. (*Major* v. *Lansley*, 2 Russ. & My. 355).

The question with regard to the disposition of the choses in action of a married woman, most frequently arises in cases in which the choses in action are reversionary interests; but the rule of law applies full as much to immediate interests, when not in possession, (*Pierce* v. *Thornely*, 2 Sim. 167; *Amhurst* v. *Selby*, 11 Vin. 377, pl. 8; see, too, *Mitford* v. *Mitford*, 9 Ves. 87; *Hornsby* v. *Lee*, 2 Mad. 16), where the husband died after the event on which the interest Immediate, as well as reversionary, interests within the rule.

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* See the Corrigenda to the volume, shewing that, in line six from top, for " contingent," should be read " vested reversionary."

FOR SETTLING THE CONSTRUCTION OF A WILL.

A. B., party hereto, M. B., R. S., and T. S., respectively, and their respective executors and administrators, shall

became immediate, but before the reduction into possession. It is not the interest being reversionary, but its being a chose in action, which disables the husband from disposing of it. (See, however, *Ripley* v. *Woods*, 2 Sim. 165). The precedent in the text is an example of the interest being immediate, but not being reduced into possession.

Husband can dispose of the reversionary terms of years of his wife.

The principles previously laid down do not affect the right of the husband to assign a reversionary term of years belonging to his wife; for a term of years is not a chose in action; and it is now settled, that the reversionary interest, whether legal or equitable, of a wife, in a term of years, may be disposed of by the husband, although he do not survive his wife, and die before the reversion falls into possession. (*Donne* v. *Hart*, 2 Russ. & Myl. 360). And it is of no consequence that the wife's interest in the term is contingent, and that the husband dies before the contingency is determined. (Id.; see, too, 1 Russ. 9, n. (*b*); Co. Lit. 351. a. note 11). But if the husband do not, in his lifetime, dispose of a term belonging to his wife, and die in her lifetime, it will survive to her, as against his representatives: if he outlive his wife, the term will survive to him. (See the above authorities, and Co. Lit. 46. b.; *Moody* v. *Matthews*, 7 Ves. 183).

Release by the husband of his wife's choses in action.

The law with respect to the operation of the husband's release on the wife's choses in action is not well settled. In *Gage* v. *Acton*, (1 Salk. 527; S. C. 1 Lord Raym. 515), Lord Holt said, "that when the wife has any right or duty, which, by possibility, may happen to accrue during the marriage, the husband may, by release, discharge it." But this was a mere dictum, uttered upon a point totally different from that which the court had then to decide, and by a judge who, in the discussion in which he uttered them, was in a minority. The same doctrine seems, however, to be assumed in *Lord Carteret* v. *Paschal*, 3 P. Wms. 199. But, from other cases, it seems clear, that if the wife's chose in action is in contingency, depending on the event of survivorship, the husband may release his own right, but he cannot bar or release hers. (*Belcher* v. *Hudson*, Cro. Jac. 222; S. C. Yelv. 156; *Clark* v. *Thomson*, Cro. Jac. 571).

Whether the husband's right is as survivor or administrator.

In all cases in which the wife's right, by survivorship, would be barred by the husband having reduced her chose in action into possession in his lifetime, there, in the event of his surviving her, he may bring an action for such choses in action, in his own right, and not as administrator of his wife. (*Forbes* v. *Phipps*, 1 Eden, 502). In other cases, the husband must sue as administrator to his wife, and, in that character, will be entitled to all her personal estate which continued in action at her death. (1 Wms. Exors. 564). Fur-

FOR SETTLING THE CONSTRUCTION OF A WILL.

and will abide by and fulfil the arrangement intended to be made by these presents; and shall and will, at all times hereafter, at the costs and charges of the said residuary estate of the said A. B., deceased, make, do, and execute all such further and other lawful and reasonable acts, deeds, matters, and things, for the further, better, and more perfectly confirming and carrying into effect the arrangement aforesaid, and for indemnifying and saving harmless the said N. P., G. H., and C. B., party hereto, and every of them, their and every of their executors, administrators, and assigns, in the conduct thereof, as by the said N. P., G. H., and C. B., party hereto, or the survivor or survivors of them, or the executors or administrators of such

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ther information on this point will be found, 1 Wms. Exors. 244, 564. For conveyancing purposes, it is seldom of any consequence, whether the husband becomes entitled in his own right, or as his wife's administrator.

What is a reduction into possession.

In concluding the subject discussed in this note, it will be desirable to state the principal points which have been decided, as to what constitutes a reduction into possession by the husband of his wife's choses in action.

Of course, an actual payment or transfer to the husband, or to his account, is a reduction into possession; (*Glaister* v. *Hewer*, 8 Ves. 195; *Ryland* v. *Smith*, 1 My. & Cra. 53; *Re Jenkins*, 5 Russ. 183); and that, notwithstanding it has been made during the life of a prior tenant for life. (*Doswell* v. *Earle*, 12 Ves. 473). But the receipt by the husband of interest on the sum in question, is not a reduction into possession. (*Hore* v. *Woulfe*, 2 Bull. & Beat. 424; *Nash* v. *Nash*, 2 Mad. 133; *Horwood* v. *Fisher*, 1 You. & Col. 110). A judgment obtained at law survives to the wife, if the husband die before execution. (*Garforth* v. *Bradley*, 2 Ves. senr. 675; and a suit in equity for a legacy, even after a decree for an account, is not a reduction into possession. (*Adams* v. *Lavender*, M'Clel. & You. 41, and cases there cited). Whether a decree in such a suit for payment of the legacy is not, however, a reduction into possession, seems doubtful. (*Forbes* v. *Phipps*, 1 Eden, 502; *Nanney* v. *Martin*, 1 Cha. Ca. 127; Eden's notes to *Hargate* v. *Annesley*, 3 Bro. C. C. 361; *Adams* v. *Lavender*, ubi supra).

The receipt, or possession by the husband, as an executor or trustee of the fund, or the payment of it by his directions to trustees for his wife, is not a reduction into possession. (*Baker* v. *Hall*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413; *Ryland* v. *Smith*, 1 My. & Cra. 53).

(See, further, 1 Wms. Executors, 555, 561; and Roper's Husband & Wife, ch. 5, s. 4).

FOR SETTLING THE CONSTRUCTION OF A WILL.

survivor shall be reasonably required: AND EACH of them the said N. P., G. H., and C. B., party hereto, so far as relates to his own acts and deeds, and the acts and deeds of his executors and administrators; and the said N. P. and G. H., so far also as relates to the acts and deeds of their respective wives, (both during coverture and after they may have become discovert), and of the executors and administrators of their respective wives, doth hereby, for himself, his heirs, executors, and administrators, covenant with the others and other of them, their and his executors and administrators, that they the said N. P., Q. P., G. H., I. H., and C. B., party hereto, respectively, and their respective executors and administrators, shall abide by and fulfil the arrangement intended to be made by these presents; and shall and will, at the costs and charges of the said residuary estate of the said A. B., deceased, make, do, and execute all such further and other lawful and reasonable acts, deeds, matters, and things, for the further, better, and more perfectly confirming and carrying into effect the arrangement aforesaid, and for indemnifying and saving harmless the said N. P., G. H., and C. B., party hereto, and every of them, their and every of their executors, administrators, and assigns, in the conduct thereof, as by the said N. P., G. H., and C. B., party hereto, or the survivors or survivor of them, or the executors or administrators of such survivor, shall be reasonably required. IN WITNESS &c.

Mutual covenants for themselves and wives by the executors to fulfil the arrangement.

XV.

FOR OBTAINING LETTERS PATENT.

AGREEMENT *between* BRITISH SUBJECTS *and a* FOREIGNER, *for obtaining* LETTERS PATENT *for an Invention discovered by the Foreigner* (*a*).

Parties.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., (a foreigner, residing abroad), of the one part, and

(*a*) The law respecting patents depends on the statute 21 Jac. 1,

C. D. and E. F., of &c., brassmakers and copartners, of the other part: WHEREAS, the said A. B. has represented

FOR OBTAINING LETTERS PATENT.

Recites, that A. B. has invented a new mode of manufacture.

c. 3, which, after declaring all monopolies void, and contrary to law, contains the following saving, (sect. 6):—"Be it declared and enacted, that any declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years, or under, hereafter to be made, of the sole working or making of any manner of *new manufactures* within this realm, *to the true and first inventor or inventors* of such manufactures, which others, at the time of making such letters patent and grants, shall not use; so, also, as they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the said letters patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be, if this act never had been made, and of none other."

It is assumed in the act, and is always considered, that the crown had, at common law, the power to grant patents; the act prescribes the future limits for these grants. (See 2 H. Black. 491).

The only things for which patents can be obtained are, "new manufactures;" they must be *manufactures*, and they must be *new*. The word manufactures in the statute is applied, not only to the things made, but to the method and practice of making; to principles carried into practice in a new manner; to new results of principles carried into practice. (*Boulton* v. *Bull*, 2 H. Black. 463, 492; *Hill* v. *Thompson*, 8 Taunt. 375; S. C. 2 J. B. Moore, 424; Holt, 636; 3 Mer. 629; *Rex* v. *Wheeler*, 2 B. & Ald. 345; *Campion* v. *Benyon*, 6 J. B. Moore, 71; 3 Brod. & Bing. 5; *Minter* v. *Wells*, 1 Cro. Mee. & Ros. 505; S. C. 5 Tyr. 163; *Derosne* v. *Fairie*, 2 Cro. Mee. & Ros. 476; S. C. 5 Tyr. 393; *Lewis* v. *Davis*, 3 Car. & Pay. 502; *Hullett* v. *Hague*, 2 B. & Ad. 370; *Kay* v. *Marshall*, 1 My. & Cra. 373). But there can be no patent for a mere principle. (2 H. Black. 495; *The King* v. *Cutler*, 1 Stark. 355; *Minter* v. *Wells*, ubi supra).

The meaning of the word "new," is partly explained by the statute itself, as indicating manufactures, "which others, at the time of making such letters patent and grants, shall not use;" and has been the subject of judicial interpretation in *Lewis* v. *Davis*, 3 Car. & Pay. 502; *Lewis* v. *Marling*, 10 B. & C. 22. A patent cannot be obtained for an article which has been publicly vended, even by the inventor himself. (*Anon.* 1 Chit. 24 b; *Lord Cochrane* v. *Smethurst*, 1 Stark. 205; *Wood* v. *Zimmer*, Holt, 58; *Brunton* v. *Hawkes*, 4 B. & Ald. 541; *Hill* v. *Thompson*, ubi supra; *Saunders* v. *Aston*, 3 B. & Ad. 881; see, too, *Davies' Patent Cases*, 49; *Liardet* v. *Johnson*, Bull. N. P. 76).

A patent may be obtained for an addition to an old machine.

FOR OBTAINING LETTERS PATENT.

to the said C. D. and E. F., that he has invented a new and improved method of manufacturing brass (*b*): AND WHERE-

—that parties wish to enter into agreement respecting it.

(*Hornblower* v. *Boulton*, 8 T. R. 95; *Harmer* v. *Playne*, 11 East, 101; S. C. 14 Ves. 133; *Ex parte Fox*, 1 Ves. & B. 67; *Huddart* v. *Grimshawe*, Dav. Pat. Ca. 265).

It seems that evidence was refused in an issue whether a patent was generally inconvenient. (*Rex* v. *Arkwright*, Bull. N. P. 76). And it is now clearly settled that a patent can only be had for an invention which is useful. (*Hill* v. *Thompson*, ubi supra; *Haworth* v. *Hardcastle*, 1 Bing. N. C. 182; S. C. 4 Moo. & Scott, 720; *Bloxham* v. *Elsee*, 6 B. & C. 169; S. C. 9 Dow. & Ry. 215; *Manton* v. *Parker*, Dav. Pat. Ca. 332).

The statute also prescribes that patents shall only be granted for new manufactures to the "true and first inventor or inventors" of such manufactures. The inquiry as to who is or are such first inventor or inventors, is necessarily involved in the cases previously cited, with respect to the question whether the patent is new. A man claiming to be an inventor, must not have taken his idea from books or the information of other British subjects; (*Rex* v. *Arkwright*, Dav. Pat. Ca. 61, 129; S. C. cited 8 Taunt. 395); but a person who obtains his information from a foreigner, may obtain a patent as an inventor. (*Wood* v. *Zimmer*, Holt N. P. C. 98; *Edgeberry* v. *Stephens*, 2 Salk. 447; *Bloxham* v. *Elsee*, 6 B. & C. 169; S. C. 9 Dow. & Ry. 215). If two persons separately discover the same thing, the one who first publishes his discovery is considered the inventor. (*Dollond's case*, and *Tennant's case*, cited 8 Taunt. 395; *Boulton* v. *Bull*, 2 H. Black. 487; *Lewis* v. *Marling*, 10 B. & C. 22).

The law, with regard to this point, has been materially altered by the statute 5 & 6 Will. 4, c. 83, s. 2, which enacts, that if it be shewn, that any person who shall have obtained letters patent for any invention, or supposed invention, was not the first inventor thereof, or of some part thereof, by reason of some other person or persons having invented or used the same, or some part thereof, before the date of such letters patent, or if such patentee, or his assigns, shall discover that some other person had, unknown to such patentee, invented or used the same, or some part thereof, before the date of such letters patent, it shall be lawful for such patentee, or his assigns, to petition for and obtain a confirmation of the former, or a grant of a new patent for the invention, which shall give the patentee, or his assigns, the exclusive use of the invention.

Form of recital of alleged invention.

(*b*) Where, in an indenture, by which a licence was granted for the use of a patent machine, there was contained a recital, that the grantor had invented the machine, it was held, that the parties to the deed were estopped from alleging that the grantor had not invented

FOR OBTAINING LETTERS PATENT.

AS the said A. B. and the said C. D. and E. F. are desirous of entering into an arrangement with respect to the said invention, so represented to have been made upon such terms, and under and subject to such stipulations, conditions, and covenants as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said desire, and in consideration of the premises, it is hereby agreed and declared, between and by the parties to these presents, and the said A. B., (so far as relates to his own acts and deeds, and the acts and deeds of his executors and administrators), doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors and administrators, and the said C. D. and E. F., (so far as relates to their own acts and deeds, and the acts and deeds of their executors and administrators), do hereby, for themselves, their heirs, executors, and administrators, covenant with the said A. B., his executors and administrators, in manner following; (that is to say), THAT the said A. B. shall and will, immediately after the date and execution of these presents, fully and completely communicate, disclose, specify, and explain to the said C. D. and E. F. the nature of the said invention, so represented to have been made by the said A. B., of a new and improved method of manufacturing brass, and the whole process of the said manufacture, in such a manner as will enable the said C. D. and E. F. to manufacture brass according to the said new and improved method, and to prepare and furnish such specification (*c*) of

Witnesseth agreement and covenants.

That A. B. shall disclose his invention;

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the machine. (*Bowman* v. *Taylor*, 2 Ad. & Ell. 278; S. C. 4 Nev. & Man. 264). But the estoppel must be pleaded. (*Bowman* v. *Rostron*, 2 Ad. & Ell. 295). Hence, in assignments of patents the recital should always be, that the grantor has alleged or represented that he is the inventor of the patent; and in the case of such an agreement as that in the text, the form of recital should clearly be the same, because before the invention is communicated to the intended purchasers, it is impossible to say whether the invention is new and useful, and whether the alleged inventor is the first and true inventor, within the meaning of the statute. There is, however, no estoppel, if the agreement be not under seal. (*Chanter* v. *Leese*, 4 Mee. & Wels. 295).

(*c*) The specification must be so framed as that others may be taught by it to do the things for which the patent is granted; and it

The specification.

FOR OBTAINING LETTERS PATENT.

the said invention as will be required, in case letters patent, for the sole use of the said invention within the United Kingdom, shall be applied for and obtained, as is hereinafter-mentioned; and shall and will, if required, aid and assist, so far as he is able, in preparing such specification as aforesaid; and also, that he, the said A. B., shall and will, personally exhibit and shew to the said C. D. and E. F., all the processes and details of the said new method of manufacture, so and in such manner as may enable them fully to understand and practise the said several processes and details; and shall and will, at the costs and charges of him, the said A. B., prepare and furnish, or cause to be prepared and furnished, all such plans, drawings, models, and other things, as may be necessary for fully instructing the said C. D. and E. F. in the said new method of manufacture, and all processes and details thereof: THAT the said C. D. and E. F. shall, within —— from the date and execution of these presents, (in case the said A. B. shall then have communicated the nature and details of the said invention, at the time and in manner aforesaid), determine whether they will or will not use and employ the said invention, and of such their determination give notice in writing, under their hands, to the said A. B., in case he shall be then living, and the place of his abode shall be known to the said C. D. and E. F.: THAT, in case the said C. D. and E. F. shall determine not to use and employ the said invention, then that they, or either of them, shall not nor will disclose, communicate, or reveal the nature of the said

—and assist in preparing the specification;

—and personally shew the process of manufacture;

—and prepare plans, models, &c.

That C. D. and E. F. shall accept or reject the invention within a limited time.

That if C. D. and E. F. reject the invention, they shall not disclose or use it.

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must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it. The title to the patent, and the description in the specification must agree, and the specification must be perfectly free from ambiguity. It is unnecessary, in a work of this nature, to go further into the subject of preparing specifications, as it never falls to the conveyancer to prepare such instruments, or to investigate their sufficiency as a matter of title. The principal cases and the results will be found succinctly stated in Smith on Patents, sect. vii. The most recent cases on specifications, are *Russell* v. *Cowley*, 1 C. M. & R. 864; *Derosne* v. *Fairie*, 2 C. M. & R. 476; S. C. 5 Tyr. 193. Of course, in such an agreement as the present, it is necessary to stipulate that the inventor shall aid in preparing the specification.

FOR OBTAINING LETTERS PATENT.

invention, or any part thereof, to any person or persons whomsoever, or at any time or times hereafter make any use whatsoever of the said invention, or any part thereof (*d*): THAT in case the said C. D. and E. F. shall determine to use and employ the said invention, or any part or parts thereof, then, that the said C. D. and E. F. shall, as soon as conveniently may be after such determination, at their own costs and charges, and in their own names, apply for, and use their best endeavours to obtain letters patent, under the great seal of the United Kingdom, for the sole use, benefit, and advantage of the said invention, or of such part or parts thereof as they shall think fit, within the said United Kingdom, and the colonies and plantations thereof, or for such part or parts of the said kingdom, colonies, and plantations as they shall think fit, and for the term or terms for which such letters patent are usually granted (*e*): THAT, in case such letters patent as are hereinbefore mentioned shall be obtained, the said A. B. shall and will, if required by the said C. D. and E. F., or either of them, during the space of —— weeks from the date of the said letters patent, personally teach, instruct, inspect, aid, and assist all and every the workmen,

That if C. D. and E. F. accept invention, they shall obtain letters patent.

That A. B. shall instruct workmen;

(*d*) In *Newberry* v. *James*, 2 Mer. 446, the court refused to interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree for a specific performance, namely, an agreement not to impart the secret of an invention, which had been the subject of a patent long since expired. In *Williams* v. *Williams*, 3 Mer. 157, Lord Eldon doubted whether a contracting party was entitled to the protection of the court, in the exercise of its jurisdiction, to decree the specific performance of agreements, by restraining a party to the contract from divulging the secret he has promised to keep. But, at any rate, it is apprehended, that the inventor might obtain damages in an action for a breach of the covenant not to disclose the secret; and in the present state of the law, such a covenant should always be inserted. It may be prudent to fix a sum, as liquidated damages, for a breach of the agreement. (See ante, page 134, note (*r*)).

Covenant to keep invention secret.

(*e*) On the method of obtaining a grant of letters patent, see Smith on Patents, ss. v. vi. and Appendix ii. to the work, 1—4; see, too, Knapp's Reports, Appendix i. ii. iii.

FOR OBTAINING LETTERS PATENT.

servants, and others who shall be named for that purpose by the said C. D. and E. F., or one of them, in the said new method of manufacture, and all the processes and details thereof, and shall and will use his best endeavours to render such workmen, servants, and others, adept and skilful in the said method of manufacture, and all the processes and details thereof (*f*); and that after the said letters patent shall be obtained, the said A. B. shall not and will not (unless required as aforesaid) in anywise interfere or intermeddle with the said manufacture for which the said letters patent shall be granted, but that the same shall be carried on and conducted solely by the said C. D. and E. F., their executors, administrators, licensees, or assigns; THAT the said C. D. and E. F., their executors or administrators, shall have full power and authority to grant licenses (*g*) for the use of the said invention, upon such terms as they shall think fit, and to assign and grant the said letters patent, and the benefit thereof, and of the said invention, for such consideration, and for such terms and upon such conditions as to them shall seem meet, and so make any such disclaimer of or alteration in the title or the specification, as shall be allowable by law (*h*), and to apply for and obtain any extension or prolongation (*i*) of the

—and not intermeddle with the manufacture unless required.

That C. D. and E. F. may grant licenses;

—and assign the patent;

—and disclaim part of, or alter, the specification;

(*f*) It is of great importance to procure the personal assistance of the inventor in instructing the workmen; and, therefore, this clause should always be inserted.

(*g*) As to licenses for the use of patent inventions and assignments of letters patent, see the notes, infra, on the precedents of those instruments.

(*h*) By the statute 5 & 6 Will. 4, c. 83, s. 1, any person having obtained letters patent for any invention, may enter a disclaimer of any part of his specification, or a memorandum of any alteration therein; and such disclaimer or memorandum, when filed as mentioned in the act, is to be deemed part of the original letters patent or specification.

(*i*) The statute 5 & 6 Will. 4, c. 83, enables the crown, in manner therein mentioned, to grant a prolongation of the term of letters patent, such prolongation not to be for more than seven years beyond the first fourteen.

FOR OBTAINING LETTERS PATENT.

term of the said letters patent or any of them, and generally to act in regard to the said letters patent, and the said invention, in every particular as if they had originally invented the new method of manufacture without any communication with the said A. B., or any other person: THAT the said A. B. shall receive from the said C. D. and E. F., their executors or administrators, one moiety or equal half part of the net profits (*k*) to be derived from the use of the said invention by the said C. D. and E. F., their executors or administrators, and also a moiety or equal half part of all annual or other sums of money or considerations whatsoever, to be paid or rendered in respect of any licenses for the use of the said invention, or any part thereof, which shall be granted by the said C. D. and E. F., their executors, administrators, or assigns, and also a moiety or equal half part of all annual or other sums of money or considerations whatsoever to be paid or rendered by any assignee or assignees of the said letters patent or invention, or of any part, share, or interest therein: THAT all costs, charges, losses, damages, and expenses to be incurred in respect of the said letters patent, and the specification of the said invention, or in respect of the carrying on of the said manufacture, or of resisting any infringement of the said letters patent (*l*), or in respect of any act, matter, or thing whatsoever, in anywise relating to the premises, shall be wholly paid, borne, and sustained by the said C. D. and E. F., their executors, administrators, and assigns: PROVIDED ALWAYS, and it is hereby agreed and declared, between and by the parties to these presents, that no matter or thing in these presents contained, shall preclude or prevent the said A. B., his executors, administrators, or assigns, from using or employing the said invention in any way he or they shall think proper, in any country, place, or kingdom whatsoever, to which

—and apply for an extended term.

A. B. to receive half of the net profit.

Costs to be paid by C. D. and E. F.

A. B. not to be precluded from using the invention in foreign countries.

(*k*) This provision constitutes a partnership between the parties; see infra, note (*m*).

(*l*) As to the remedy for the infringement of letters patent, and the means of obtaining their repeal, see Smith on Patents, ss. viii. ix.; *Crossley* v. *Beverley*, 1 Russ. & My. 166; S. C. 9 B. & C. 63; *Stury* v. *De la Rue*, 5 Russ. 322; *Minter* v. *Williams*, 5 Nev. & Man. 647; *Fisher* v. *Dewick*, 4 Bing. N. C. 781.

FOR OBTAINING LETTERS PATENT.

the letters patent to be obtained by the said C. D. and E. F. shall not extend; PROVIDED ALSO, and it is hereby agreed and declared, between and by the parties to these presents, that the said A. B. shall not be deemed, taken, or considered to be in anywise the co-partner (*m*) of the said C. D. and E. F., or of either of them, or have any right

A. B. not to be deemed a partner with C. D. and E. F.;

Communion of profit constitutes partnership.

(*m*) In framing agreements of the nature of that in the text, considerable difficulty is experienced, because the capitalists, who are to work the patent, very seldom intend to admit the inventor as their partner in the business; and yet do not choose to yield him any other remuneration than a proportion or share of the net profits (if any), to be derived from the use of the invention. But an agreement to share the net profits of an undertaking, although one party alone is to bear the losses, constitutes a partnership in it. (Collyer's Law of Partnership, 8, and ch. 1. sect. 11; *Gilpin* v. *Enderbey*, 5 B. & Ald. 954; *Bond* v. *Pittard*, 3 Mee. & Wels. 357). And although it is certain, parties may stipulate, that, in spite of the communion of profits, there shall, inter se, be no partnership; yet this cannot affect the right of third persons to treat them and to deal with them as partners. (*Waugh* v. *Carver*, 2 H. Bl. 325; *Gilpin* v. *Enderbey*, *Bond* v. *Pittard*, ubi supra; Collyer's Law of Part. ch. 1, sect. 11). And it is decided, that there may be a partnership in a patent. (*Lovell* v. *Hicks*, 3 You. & Col. 472, 481; *Ridgway* v. *Philip*, 1 Cro. Mee. & Ros. 415).

Hence, when the inventor is to be paid by a share of the *net* profits, the only way in which the capitalist can be protected, is by a stipulation, that the inventor shall lose all interest in the patent, if he in anywise attempt or assume to act as a copartner. This is no hardship on the inventor, because he expressly agrees not to act as a partner; and a breach of that agreement must necessarily be intentional and fraudulent.

Under what circumstances a partnership is not constituted.

It may be observed, that a copartnership is not constituted by an agreement to share the gross profits of a concern. (*Dry* v. *Boswell*, 1 Camp. 330; nor by one person being the mere servant or agent of the other, and receiving a share of profits in lieu of wages; (Collyer's Law of Part. 14—20); nor by a person receiving interest on money lent, or an annuity not varying with the profits); *Grace* v. *Smith*, 2 Sir W. Bl. 99); although the receipt of an annuity determinable on the ceasing of the trade, or varying with the profits, makes the annuitant a partner. (*Bloxam* v. *Pell*, 2 W. Bl. 999; *Ex parte Wheeler*, Buck, 48). Of course, an agreement, that the inventor of a patent should receive a fixed sum for each article made, or a sum varying with the market price, would not constitute him a partner. It is, however, difficult to enter into an agreement of this kind till the nature of the invention is made known.

FOR OBTAINING LETTERS PATENT.

whatever to interfere or intermeddle in their or either of their affairs, further or otherwise than the right to require from time to time a full and just account of the profits and emoluments to be derived from the use of the said invention; and that if the said A. B., his executors or administrators, shall at any time hereafter do any act whatsoever, (other than requiring the said account), in the character of a co-partner of the said C. D. and E. F., or of either of them, or of their or either of their executors, administrators, or assigns, or attempt in anywise to bind or render responsible the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, for any act, deed, or matter to be made, done, or executed by him the said A. B., or shall in anywise interfere or intermeddle (otherwise than as aforesaid) in the affairs of the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, or with respect to the said letters patent and invention, or any thing relating thereto, then and in such case the said A. B. shall lose all right and title to have, receive, or take the aforesaid moiety or equal half part hereinbefore provided for him, or any other part or share of the profits and emoluments of the said invention, and the whole of the profits and emoluments to be derived from the said invention, including any balance which shall then be due, but shall not then have been paid over to the said A. B., and all interest in the said invention and in the said letters patent shall thenceforth belong to the said C. D. and E. F., their executors, administrators, and assigns, for their sole use and benefit. IN WITNESS &c.

—and to lose all interest, if he act as a partner.

AGREEMENTS *for* LEASES (*a*).

FOR LEASES.

(*a*) It has been found more convenient to reserve the precedents of these instruments for insertion in a subsequent part. They will appear under the head of "Leases."

PURCHASE DEEDS.

XVI.

CONVEYANCE IN FEE.

CONVEYANCE *in* FEE *by* LEASE *and* RELEASE; *the Vendor being seised in Fee, and his* WIFE *joining for the purpose of releasing her Right of* DOWER.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*vendor*], and E. B. his wife (*a*), of the one part; and C. D., of &c. [*purchaser*], of the other part (*b*); WHEREAS

Recital of agreement for purchase.

(*a*) When a married woman is a party to a deed, her husband is always joined, and made a party of the same part as his wife.

As to reciting the seisin in fee of the vendor.

(*b*) When the vendor conveys, in fee, it is unusual to recite that he is seised in fee, that fact being assumed. (See Introd. to this volume, ante, page 4). An advantage might, however, be gained in certain cases, by the insertion of a recital, that the vendor is seised in fee, because he might be thereby estopped from alleging, at a subsequent time, that he was not seised in fee. As, when the vendor had not the fee at the date of the conveyance, but acquired it subsequently, it was held, that the recital operated by way of estoppel so as to bind the vendor. (*Bensley* v. *Burdon*, 2 Sim. & Stu. 519; 2 B. & Ad. 282; but see 2 Sugd. Vend. & Pur. 264, n. (b)). As, however, all purchase deeds of this nature contain a covenant by the vendor, that he is seised in fee; and as there seems no reason why such a covenant may not act by way of estoppel, (*Newton* v. *Weeks*, All. 79; S. C. Vin. Abr. Estop. M.), the addition of the recital of seisin appears to be superfluous.

Estoppel by recital.

It was formerly held, that estoppel could not be by recital, Co. Lit. 352. b.; but the contrary doctrine is now well established.

CONVEYANCE IN FEE.

the said C. D. hath contracted and agreed with the said A. B. for the absolute purchase (*c*) of the pieces or parcels of land and other hereditaments hereinafter particularly mentioned, and intended to be hereby released, with their appurtenances and the inheritance thereof, in fee simple, in possession, free from incumbrances (*d*), at or for the price

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(*Lainson* v. *Tremere*, 1 Ad. & Ell. 792; *Bowman* v. *Taylor*, 2 Ad. & Ell. 278; *Bowman* v. *Rostron*, Id. 295). But an estoppel should be certain, to every intent; and, therefore, if the matter be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel, nor shall a man be estopped where the truth appears by the same instrument. (*Right* v. *Bucknall*, 2 B. & Ad. 278; *Doe* d. *Barker* v. *Goldsmith*, 2 Cro. & Jerv. 674; *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 12, 897).

Law of estoppel;

(See further, on the subject of estoppel, Co. Lit. 352. a. b.; Vin. Abr. Estop. Com. Dig. Estop.; *Bonner* v. *Wilkinson*, 5 B. & Ald. 682; *Doe* d. *Strode* v. *Seaton*, 2 Cro. Mee. & Ros. 728; and the authorities cited in *Right* v. *Bucknall*, ubi supra).

—by surrender.

There can be no estoppel by the surrender of a copyhold; (*Taylor* v. *Philips*, 1 Ves. Senr. 230; *Goodtitle* v. *Morse*, 3 T. R. 365.)

It is obvious, that great care should be taken in framing recitals, that the facts recited are strictly correct, as all parties to the deeds, and persons claiming under the parties, will be estopped from disputing the correctness of the allegations.

Contract—whether to be stated as for a sale or a purchase.

(*c*) When the vendor and purchaser are each acting on their own behalf, and are each free to enter into any contract they please, the contract may be recited either as an agreement for a sale or a purchase. But, if the vendor sell, in pursuance of a power or a trust, the contract should be recited as an agreement for a sale, the power or the trust being for *him* to *sell;* and, if the purchaser be a trustee, the contract should be recited as an agreement for a purchase, the trust being for *him* to *purchase.* If both vendor and purchaser be trustees, the contract may be recited either way, or as an agreement, both for a sale and purchase. Examples of this principle will be found in different precedents.

Land tax not an incumbrance.

(*d*) After the words "free from incumbrances," it is a common practice to add, "except the land tax." But the practice is erroneous; for, as all land is primâ facie, and by the law of the land, subject to land tax, that tax is no more to be considered as an incumbrance than the window or any similar tax, or than tithes or rates, or other public charges. The freedom from land tax, is the exception to the general rule, and that fact may, with propriety, be specially stated; but, in the absence of a statement of redemption of the tax, it is fair to presume, that the general law holds good.

CONVEYANCE IN FEE.

or sum of £——: AND WHEREAS the said E. B. hath agreed to join in these presents, for the purpose and in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— (*e*), at or immediately before the sealing and delivery of these presents to the said A. B. (*f*), paid by the said C. D., (the receipt of which said sum of £——, the said A. B. doth hereby acknowledge, and of and from the same and every part thereof, doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns, for ever, by these presents (*g*)), he the said

That wife of vendor has agreed to join.

Witnesseth. Consideration.

Receipt clause.

Operative words.

Sometimes, too, the land tax is excepted in the covenant against incumbrances, even when that covenant is restricted to the acts of particular persons. And this is a more serious error than the mistake in the recital; because, the exception from the covenant of an incumbrance, which could, by no possibility, be created by the acts of any of the persons to whose acts the covenant is professedly restricted, affords ground to maintain that, notwithstanding, in words, the covenant is restricted, the obvious intention of the parties deduced from the exception is, that the covenant should be unqualified, and extend to all incumbrances, however created. See, however, the observations of the court, 1 Nev. & Per. 644.

Description of money.

(*e*) It is very common to describe the consideration as "£—— of lawful money of the United Kingdom," or "£—— of lawful British money." But in dealing with property and parties in England, such a description is wholly superfluous; for, in the absence of a special statement to the contrary, the money spoken of will be assumed to be the current and lawful money of the kingdom. If colonial or foreign property, or funded property, is being dealt with, the proper designation for distinguishing the current money of the kingdom is "sterling." All monies which are not sterling must have their proper designation given in the instrument each time they are mentioned as "£—— £3 per cent. consolidated bank annuities, £—— Jamaica currency," and so forth.

(*f*) It has been usual to insert immediately before the word "paid," the words "in hand well and truly." They are of no use whatever.

Receipt in the deed an estoppel at law.

(*g*) This receipt contained in the deed estops the vendor and all persons claiming under him, from shewing, at law, that the purchase-money was not paid. (*Harding* v. *Ambler*, 3 Mee. & Wels. 279; *Baker* v. *Dewey*, 1 B. & C. 704; *Rowntree* v. *Jacob*, 2 Taunt. 141;

A. B. hath granted, aliened, released, and confirmed (*h*), and

CONVEYANCE IN FEE.

but the fact of payment must be clearly stated; *Lampon* v. *Cooke*, 5 B. & Ald. 606).

No receipt an estoppel in equity.

Neither the receipt in the deed nor the receipt usually indorsed thereon prevents the vendor from shewing, in equity, that the purchase-money was not paid. (*Coppin* v. *Coppin*, 2 P. Wms. 291—294; *Hughes* v. *Kearney*, 1 Scho. & Lef. 132; *Winter* v. *Lord Anson*, 1 Sim. & Stu. 434; S. C. on Appeal, 3 Russ. 488, 493). It has, indeed, been usually considered, that this rule only applied as between the vendor and the immediate purchaser; and, that a third person purchasing from the immediate purchaser, and finding a receipt for the original purchase-money indorsed on the purchase-deed, was not bound or entitled to inquire further. (*White* v. *Wakefield*, 7 Sim. 401). If the rule were otherwise, no one could be safe in completing a purchase, unless he ascertained, by evidence, foreign to the deed, that the purchase-money on every purchase appearing on the abstract had been actually paid. Of course, if the solicitor of the new purchaser was also the solicitor of the old purchaser, the new purchaser would be affected with notice of the fact, that the purchase-money was not paid. (*Winter* v. *Lord Anson*, 3 Russ. 493). In a late case of *Kennedy* v. *Green*, 3 My. & Ke. 699, in which it appeared, that the receipt was not written on the deed in the usual place and manner, and that no money had actually passed, and that the deed had been fraudulently obtained by a solicitor from his client; a mortgagee from that solicitor, *who also employed the solicitor professionally*, was decreed to assign his mortgage to the original vendor without obtaining payment of his mortgage money. It was admitted, on all hands, that the mortgagee was innocent; but it was held, that the circumstances appearing on the deed, were such as to have excited reasonable suspicions. They, perhaps, were so, but the case should rather be regarded as one governed by its peculiar circumstances, and not as an authority for the general proposition, that if the receipt be written in an unusual place and manner, the purchaser is bound to inquire whether the purchase-money thereby expressed to be received was actually paid.

Indorsed receipt no estoppel at law.

No estoppel as to strangers.

It may be observed, that the receipt on the back of the deed does not estop the vendor from shewing, even at law, that the purchase-money was not paid; (*Lampon* v. *Cooke*, ubi supra; and that, as between strangers to the deed, of course, there can be no estoppel by the matter of the deed, or the receipt on the back; *Rex* v. *Scammonden*, 3 T. R. 474; *Rex* v. *Cheadle*, 3 B. & Ad. 833; *Rex* v. *Wickham*, 2 Ad. & Ell. 517).

Operative words.

(*h*) In all English instruments of conveyance, except those made in pursuance of powers, the operative words are twice inserted; once in the past, and once in the present tense. The custom arose from

CONVEYANCE IN FEE.

by these presents doth grant, alien, release, and confirm (*i*);

Release, and disposition by wife.

the ancient mode of conveyance by livery of seisin, with a charter of feoffment to preserve the evidence of the livery having been made. The charter witnessed that the feoffor "hath enfeoffed or given or granted," and generally added "and by these presents hath confirmed unto" &c. (See West's Symbolography, (edit. 1615), sect. 238; et seq; 2 Black. Com. App. No. 1). And, doubtless, this form was more sensible than the one which is now used, because, as nothing is now done to pass the estate before the deed of conveyance, words in the present tense ought alone to be used. It has not been deemed proper in the present work to introduce so great an alteration as the omission of the past tenses of the operative words would be; but the reader may feel assured, that if he wish to shorten the forms, he may, with the most complete safety, discard the past tense, and use the present tense alone. It is much to be deplored that the repetition now in use, is not abolished by the general consent of the profession.

"Bargain and sell"—improper operative words in a release.

(*i*) The operative words which have been usually employed in conveyances of freehold hereditaments, are "grant, bargain, sell, alien, release, and confirm," but after much consideration, and with the approbation of several conveyancing counsel of eminence, the editor has determined to dispense with the indiscriminate employment in this work of the words "bargain and sell," and to reserve their application for the cases for which they are appropriate.

As the statute 27 Hen. 8, c. 16, enacts that no freehold estate shall pass by bargain and sale, unless the bargain and sale be inrolled within six months after the date thereof, and as a bargain and sale vests the legal estate in the bargainee, and renders the subsequent estates equitable, it is evident that a modern release not being inrolled, cannot operate as a bargain and sale; and that if it could so operate, it would totally frustrate the designs of the parties. Hence, it is manifest that the employment of the words "bargain and sell" in a release, is altogether superfluous and erroneous, and it is for this reason, that they are omitted in these precedents. Of course, the nominal consideration is also omitted, as that was introduced simply for the purpose of rendering the release operative as a bargain and sale.

Lease for a year a bargain and sale.

A lease for a year is a proper bargain and sale, and not being a conveyance of freehold estate, does not require to be inrolled; the words bargain and sell should be retained in it, and the nominal consideration is essential to its effect.

Bargain and sell to be used in the creation of terms of years.

So the words bargain and sell should be retained in a grant of any term of years for mortgage or otherwise, because, in that case, they are operative, and if there be no actual valuable consideration for the grant, a nominal consideration must be named.

Bargain and sell—omitted in assignments.

The words bargain and sell were formerly used in all assignments of terms of years, leases, and other personal property, and a nominal

and the said E. B. (*k*), with the concurrence of the said A. B., (testified by his being a party to and executing

CONVEYANCE IN FEE.

consideration was expressed to be paid by the assignee to the assignor. But this was a mere inoperative perversion of the employment of the nominal consideration, and bargain and sale, and the most approved modern practice is to omit the words referred to, and to treat the instrument as (what it really is) a mere assignment in which the sufficient and operative word, is the word "assign." Sometimes "assign and transfer" are used, but in this collection the word "assign" alone is employed in all assignments of personal property.

Bargain and sale at common law.

The words "bargain and sell" are employed in another class of instruments with quite a different meaning, being the usual words for the execution of common law authorities. Thus executors having a power to sell real estate, convey it by the words "bargain and sell;" commissioners of bankrupts conveying copyholds in pursuance of the statutes, convey by the words "bargain and sell." The effect of the words in those cases is not at all analogous to the effect of them in a common bargain and sale operating under the statute of uses, but merely designates the parties to whom the executors and commissioners have agreed to sell, and who take under the instrument or statute by which the authority was created. The common law bargain and sale, of course, raises a seisin on which uses may be declared. There does not seem any thing peculiarly appropriate in the use of the words "bargain and sell" for the execution of common law authorities, but as there is no objection to their employment, and as they are the customary words, it is fitting in such cases to retain them.

Remarks on the other operative words.

With respect to the other operative words employed, it may be observed, that the word "grant" is the appropriate word for passing any estate in reversion, or which does not lie in livery, that the word "alien" is the general term of the English law for absolutely parting with the whole estate; (see Jacob's Law Dictionary, Alienation); and the word "release" is the essential word which operates to enlarge to a fee-simple, the estate created by the bargain and sale for a year. "Release" has, in fact, become the word by which nearly every kind of interest in freehold estate is conveyed, and is used on almost every occasion. The word "confirm" is appropriate where there has been a previous conveyance in the same or any other instrument of the property confirmed, (see the next Precedent), but is not very applicable to a case where there is one conveyance only, by only one set of operative words. It has, however, been retained in these precedents.

Mode of barring dower under the statute.

(*k*) The vendor being seised in fee-simple in possession of the property conveyed, his wife, if she survived him, would be dowable out of the property, and hence, in pursuance of the power given to her by the statute 3 & 4 Will. 4, c. 74, s. 77, she joins in the conveyance

CONVEYANCE IN FEE.

these presents), and for the purpose of releasing and extinguishing her right of dower of or in the hereditaments hereinafter mentioned, doth, by this present deed, release and dispose of, unto the said C. D. (in his actual possession now being, by virtue of a bargain and sale thereof to him made by the said A. B., in consideration of five shillings, by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for tranferring uses into possession (*l*)),

Lease for a year.

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to extinguish her right of dower. It was objected soon after the passing of the statute, that the above section did not enable a married woman to release her dower during her husband's life, because during his life, it was a mere right and not an estate. But the objection does not appear to have any force, and has been disregarded by conveyancers.

The statute requires that the husband shall concur in the deed, and that the wife shall acknowledge it; the new operative words "dispose of," are used in the statute together with "release" and some other words. It is the practice to use only the present tense for the conveyances of married women on the same principle as in the case of appointments; viz. that it is impossible that the act of conveyance can have been done previously to or otherwise than by the deed.

The mode of acknowledgment is pointed out in the above statute, sect. 79—91, and in the General Rules made by the court of Common Pleas, 10 Bing. 458—463. As to taking acknowledgments in foreign countries, see *Ex parte Birch and Bell*, 4 Bing. N. C. 394; and in Ireland, *Ex parte Anderson*, 2 Bing. N. C. 435. A married woman, trustee conveying by order of the Court of Chancery, will be permitted, although under age, to acknowledge her deed. (*In re Luke*, 1 Bing. N. C. 465). Commissioners taking an acknowledgment, have a lien for their fees on the documents. (*Ex parte Grove*, 3 Bing. N. C. 304). As to who may make the affidavit of acknowledgment, see *In the matter of Ann Scholfield*, 3 Bing. N. C. 293. Some draftsmen make the husband covenant that his wife shall acknowledge the deed, but this is needless, for as the acknowledgment is, in fact, part of the conveyance, and is essential to its efficacy, the purchase-money should not be paid before the acknowledgment by the vendor's wife any more than before the execution by the vendor.

Lease for a year;

(*l*) In order to create a valid lease for a year, on which the release may operate, it is only essential, that the person having the legal estate of freehold, should be the bargainor; but, in practice, it is

and his heirs, ALL &c. [*parcels*] (*m*), TOGETHER WITH all meadows, common of pasture, and other commons, mines, CONVEYANCE IN FEE.

Parcels.

General words for lands.

—by whom made.

usual to make all the parties, who join in the release, bargainors in the lease for a year. This is done, in order to guard against the chance of the legal estate of freehold being in any of the parties, other than the party in whom it appears to be. Of course, the term of one year is merely arbitrary; any term, greater or less, is sufficient to create the reversion required, neither is it essential that the lease for a year should be dated the day before the release; it is sufficient that at the date of the release, there is a subsisting term. The bargain and sale for the year should always be made to the releasee, but if it were made to any other person, the reversion would pass by the release, operating as a grant; the only inconvenience would be, that the legal estate for the one year would be outstanding in the bargainee. As has been previously observed, it is essential to express a valuable consideration in the lease for a year, because the instrument is, in fact, a bargain and sale, and it could not operate as such, without the expression of a valuable consideration. But the sum stated, need not be paid. (See 2 Sanders on Uses, 46, 47; 4 Cru. Dig. 101, 115).

—to whom;

—consideration of;

The parcels in the lease for a year are the same as those in the release.

—parcels of.

For further information on the nature and operation of the lease for a year, and of the conveyance by lease and release, see 2 Black. Com. 339; 2 Sand. on Uses, 60; 4 Cru. Dig. 113. Forms of the lease for a year are so common, that it has not been deemed needful to incumber the present work with them. They may be found in 2 Black. Com. App. II.; 2 Sand. on Uses, 134.

(*m*) In all assurances of corporeal hereditaments, general words are inserted immediately after the parcels, for the purpose of including in the assurance all the easements and rights appertaining to the property assured. (See next Precedent, note (*h*)). There are four forms of these words in use, adapted to the several cases of assurances of "lands"—"messuages and lands—messuages in towns," and manors; these forms are given in this and the three following precedents. In the other precedents they are referred to, and when so referred to, the subsequent clauses, beginning, "And the reversion," and "And all the estate," are to be considered and used as part of the general words, unless a special exception is made.

General words.

The purpose and effect of these latter clauses is not very obvious, but as they are always used, (except in special cases), it is desirable, in conformity with the practice of the profession, to retain them. If a term be subsisting in any of the grantors, it will pass to the releasee by the effect of these general words.

The clause, granting the title deeds, which was formerly inserted, is now omitted. (See ante, note (*a*), pp. 44, 45).

CONVEYANCE IN FEE.

minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the said pieces or parcels of land, hereditaments, and premises belonging or in anywise appertaining, or with the same or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed or accepted, reputed (*n*), deemed, taken, or known as part, parcel, or member of them or any of them, or any part of them, or appurtenant thereto, with their and every of their appurtenances; AND THE REVERSION and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said pieces or parcels of land, hereditaments, and premises hereby granted and released, or expressed and intended so to be; AND ALL THE ESTATE, right, title, interest, inheritance, reversion, use, trust, possession, property, claim, and demand whatsoever, both at law and in equity, of them, the said A. B. and E. B., and each of them, of, in, to, out of, and upon the said premises, and every part and parcel thereof: To HAVE and To HOLD the said pieces or parcels of land and hereditaments, and all and singular other the premises hereby granted and released, or expressed and intended so to be (*o*), unto the said C. D., his heirs and assigns, to the use of the said C. D., his heirs

And the reversion, &c.

And all the estate, &c.

Habendum.

(*n*) With respect to the effect of these words, and what evidence is admissible in support of them, see *Murley* v. *M'Dermott*, 3 Nev. & Per. 356.

Form of the habendum.

(*o*) The habendum should briefly enumerate the hereditaments granted as "messuages," "pieces or parcels of land," &c., and conclude with the general expression, "all and singular other the premises hereby granted" &c. For unless the habendum be made the exact echo of the operative part, there is a great risk that they may not agree, and that the description expressed in the one, may be qualified or altered by that contained in the other.

Use of the word "premises."

The word "premises," in strictness, applies to what has gone before; and, therefore, is not used in well-drawn instruments, except in reference to that which has been previously described. It should not be used before the habendum, unless the parcels are described in the recitals.

"Appurte-

It is a common custom to add, "with the appurtenances;" but this

and assigns for ever: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant (*p*) with the said C. D., his heirs and assigns, in manner following; (that is to say), that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said A. B., or any of his ancestors (*q*), or the said E. B., made,

CONVEYANCE IN FEE.

Covenants for title.

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practice is incorrect, because the appurtenances being comprehended in the general words, are actually part of the premises referred to.

nances"—not appropriate in habendum.

(*p*) The words used in covenants are extremely various; sometimes "covenant, promise, and agree," sometimes "covenant and declare," sometimes "covenant, grant, and agree," and other similar expressions. But, as the word "covenant" alone is undoubtedly effective, and as the compact entered into is always termed a covenant, and no reference is ever made to any of the other words, it has become common with many conveyancing counsel of eminence, to employ the word "covenant" alone. The editor having adhered to this usage in practice, has decided to observe it in the course of these precedents; but the old system of introducing the additional words, can, of course, be followed, by any person who prefers it. The only alteration required will be, to add the corresponding preposition "to;" as the "with" in the text refers to the verb "covenant" alone.

Words of covenant.

It may be observed, that a covenant is constituted by any words in an instrument under seal which imply a promise or agreement. (*Pordage* v. *Cole*, 1 Wms. Saund. 319, e; *Duke of St. Albans* v. *Ellis*, 16 East, 352; *Holles* v. *Carr*, 3 Swanst. 647).

(*q*) Every purchaser is said to be entitled to a complete chain of covenants for title. (1 Sugd. V. & P. 534, et seq). And hence, when the vendor is not himself the purchaser, his covenants extend to the acts of all persons who have been interested in the estate since the last preceding purchase; it being assumed, that on that purchase, a corresponding set of covenants was entered into by the then vendor. It is not, however, the custom to extend the covenants of any vendor beyond the last preceding purchase, although the regular covenants for title may not have been entered into on that occasion. In the precedent in the text it is assumed, that A. B. claims by descent; and, therefore, he covenants in respect as well of his own acts as of those of his ancestors; if he had claimed by devise, his covenant would have been in respect of his own acts, and those of his testator; if he had claimed as a purchaser, his covenant would have been in respect of his own acts only. This covenant seems fairly to be extended to the acts of his wife, although this is a point, in respect of which, the practice is not yet uniform. With regard to the construction of covenants for title, see 2 Sugd. V. & P. ch. xiii. s. 2, and the chapter on covenants, in the first volume of this work.

Covenants for title.

—to whose acts they extend;

CONVEYANCE IN FEE.

done, committed, or executed, or knowingly or willingly suffered to the contrary, he, the said A. B., at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to (*r*), the said hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, and every part thereof, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, use, trust, property, power of revocation, equity of redemption, remainder or limitation of any use or uses, or any other restraint, cause, matter, or thing whatsoever, to alter, charge, defeat, incumber, revoke, or make void the same: AND THAT, for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, they the said A. B. and E. B. now have, in themselves respectively (*s*), good right,

—for right to convey;

—chain of, usually defective.

It may be noticed that, in fact, a purchaser seldom gets a complete chain of covenants for title; for trustees, mortgagees, assignees, and other persons having merely a fiduciary character, never enter into covenants for title, and there are comparatively but a small number of titles, in the course of which a sale has not been made by persons belonging to one of the above classes. (See, further, 1 Sugd. V. & P. 534, et seq.).

But the absence of the regular chain of covenants for title is not in practice considered as a defect in the title, and very little reliance is generally placed upon the protection afforded by them. They are, however, of value, in cases in which the vendor is a man of property, and in such a situation or rank as to be easily found.

Frame of a covenant intended to operate by estoppel.

(*r*) If the indenture is intended to operate by way of estoppel, the covenant, that the vendor is seised in fee, should be absolute and unqualified, and the words, "or well and sufficiently entitled to," should be omitted." For, to operate by estoppel, an averment must be precise and certain. (*Right* v. *Bucknall*, 2 B. & Ad. 278, ante, note (*a*)).

Covenant by distinct parties—how to be worded.

(*s*) When the covenant is as to acts done, or to be done by two or more distinct parties, the expression should be, that they respectively have right to do or will do the acts in question; for, if the expression be, (as it frequently is), that they, or some or one of them, have a right to do, or will do the acts, it might be a sufficient defence to an action for a breach of the covenant by one party, to shew that the covenant had been observed by another. Thus, if the covenant be, that A. B., C. D., and E. F., or some or one of them, have right to

full power, and absolute authority, to grant, alien, release, confirm, and dispose of the said hereditaments and premises hereinbefore granted, aliened, released, confirmed, and disposed of or expressed, and intended so to be, unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND THAT it shall be lawful for the said C. D., his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the said hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by the said A. B., or his heirs, or the said E. B., or of or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for him, her, or them, or any of them, or his, or any of his ancestors: AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, and released, or otherwise, by him the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other (*t*) estates, titles,

CONVEYANCE IN FEE.

—for quiet enjoyment;

—free from incumbrances;

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convey, and an action be brought on the covenant, and the breach assigned be, that E. F. had no right to convey, it might be a valid defence, according to the words of the covenant, if it were shewn that A. B. and C. D., or either of them, had a right to convey.

If, however, it happen, that some or one of several persons have a right to do any act, but it is not altogether certain in which of them the right is actually vested, the covenant may properly run, "that they or some or one of them now have &c." And so in other kinds of covenants.

(*t*) It has been very common to insert here a long enumeration of different kinds of incumbrances, the list of which may be seen; ante Vol. ii. p. 704. But, in modern practice, this specification is usually omitted; and, certainly, it is not easy to discover for what reason it was ever introduced. Of course, any particular classes of incumbrances which are known or apprehended to exist, may, with

Specification of incumbrances omitted.

CONVEYANCE IN FEE.

troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occassioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B., or his heirs, or the said E. B., or any person or persons lawfully or equitably claiming, or to claim by, from, under, or in trust for him, her, or them, or any of them, or his, or any of his ancestors: AND FURTHER, THAT he the said A. B. and his heirs, and the said E. B., and all and every other person or persons having or claiming, or who shall, or may have, or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises hereinbefore granted, and released or expressed, or intended so to be, or any of them, or any part thereof, from, under, or in trust for him the said A. B., or his heirs, or any of his ancestors, or the said E. B. shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said C. D., his heirs and assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed all and every such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, and more perfectly and absolutely granting, conveying, and assuring of the said hereditaments and premises hereinbefore granted and released, or expressed, and intended so to be, and every part thereof, unto and to the use of the said C. D., his heirs and assigns, as by the said C. D., his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required (*u*). IN WITNESS &c.

—for further assurance.

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propriety, be expressly mentioned; although, if any serious danger is feared, the more usual course is to take an indemnity, and generally by a separate deed, that the incumbrance may not appear on the face of the conveyance.

Verbosity of the covenants for title.

(*u*) It will be noticed, that the covenants for title are extremely verbose, and contain many superfluous expressions; but, as it is impossible to say, that the existing practice is to abridge them, (other-

XVII.

CONVEYANCE *by* APPOINTMENT, *and* LEASE *and* RELEASE, *to the* COMMON USES TO BAR DOWER (*a*).

CONVEYANCE TO USES TO BAR DOWER.

THIS INDENTURE made &c. BETWEEN A. B., of &c. [*vendor*], of the first part; C. D., of &c. [*purchaser*], Parties.

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wise than in the points mentioned in the preceding notes (*p*) and (*t*)), the editor has not ventured to make any alterations. For particular drafts, in which brevity is very much required, the covenants are certainly reduced, at least one half in length, without impairing their efficiency; and no conveyancer ever hesitates to abridge them, when he is urged to do so. Some examples of the way in which the covenants for title may be abridged will be found in the precedents of mortgages, and may easily be adapted for insertions in purchase deeds, by adding the words of restriction.

It is very common to abridge the covenants for title in mortgage deeds, because, unless with a view to a sale or foreclosure, they are of little use to the mortgagee.

(*a*) As the law stood before the statutes of the 3 & 4 Will. 4, a woman was dowable out of all the lands of which her husband was seised in possession at any time during the coverture; and her right could only be extinguished by the inconvenient and expensive process of levying a fine. Even, if it were not desired to alienate the land, dower was a provision inconvenient for the widow, and not in conformity with modern customs. Hence, it became a desideratum in conveyancing to devise such a mode of limiting an estate in favour of the husband as should prevent the wife's right of dower from attaching, and yet leave him the absolute power of disposing of the estate. Several methods by which it was attempted to accomplish this were formerly in use; (see Co. Lit. 379. b. n. 1); but they were all long since superseded by the form recommended by Mr. Fearne in his work on Contingent Remainders*, and which is substantially the same as that given in the following precedent. The limitation

Origin and advantage of the limitation to uses to bar dower.

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* Page 347; see, too, Mr. Butler's note on the forms.

CONVEYANCE TO USES TO BAR DOWER.

of the second part; and E. F., of &c. [*trustee*], of the third

to such uses as the purchaser shall appoint gives him an absolute power over the estate, and one which he may exercise without the concurrence of any other person, and without the employment of a lease for a year. The subsequent limitations prevent the wife's right of dower from attaching, even if the husband die without having exercised his power. It was formerly doubted whether, if the estate were limited to such uses as the husband should appoint, and in default of appointment to him in fee, he could preclude his wife's right to dower by the exercise of his power; 2 Sugd. Pow. 34—36. But the question is now decided in the affirmative. (*Ray* v. *Pung*, 5 B. & Ald. 561; 5 Mad. 310).

Appointment always confirmed by lease and release.

It is manifest, that when the estate stands limited to such uses as the owner shall appoint, and in default of appointment to the uses in the text, the owner can, by an exercise of his power, vest the estate in any other person. But, it has always been the practice of conveyancers to make the owner confirm his appointment by a conveyance by lease and release as in the following precedent; and it has been a very common practice to make the trustee join in the conveyance. (1 Sugd. Pow. 247). The reason assigned is, that the owner may have destroyed his power; but there does not seem to be much more ground for apprehending this, than that he may have parted with his estate. And, in small purchases, in which it is desirable to save the expense of the lease for a year—the conveyance is constantly made by appointment alone. The practice of making the trustee concur, is in great measure abandoned; and it may be laid down as the modern rule, that the trustee should never be made a party to any assurance.

Concurrence of the trustee.

Effect of the dower act on the old mode of limitation.

The statute 3 & 4 Will. 4, c. 105, has placed the wife's dower at the discretion of the husband; and, although the alteration of the law does not affect wives who were married before the 1st of January, 1834; yet the wife can now bar her dower by joining in and acknowledging a deed. (See the form ante, Precedent XVI. and note (*k*)). Hence, the old mode of limiting the estate has, in great measure, lost its value; but it will be proper to retain the form for several years to come, in order to prevent the necessity of inquiry at a future time, whether the owner of the estate was married before the 1st of January, 1834. And, in order to meet the case of the owner having married after the 1st of January, 1834, it is the universal practice to add a declaration, that no widow shall be entitled to her dower.

There is no practical hardship in excluding widows from their right of dower, because dower is never regarded or depended upon as a provision.

Effect of ap-

Although the custom of limiting estates to such uses as the pur-

part; WHEREAS (*b*), by indentures of lease and release, bearing date respectively the 4th and 5th days of June,

CONVEYANCE TO USES TO BAR DOWER.

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chaser should appoint, was chiefly followed with a view to the exclusion of dower, it produced a further effect of great practical importance. For, when a person takes an estate by appointment under the power, he takes it under the instrument which created the power, and not under the appointor; and, therefore, until the passing of the late statute, a person taking an estate by appointment took it freed from the judgment debts of the appointor. This principle was established by the cases of *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459, and *Tunstall* v. *Trappes*, 3 Sim. 300; and the judgment creditor could have no relief in equity, although the appointee took, with notice of the judgment. (*Eaton* v. *Sangster*, 6 Sim. 517). In consequence of this rule, it became unnecessary to search for judgments on purchases from persons having powers of appointment, and much expense was saved to purchasers, and much perplexity to their counsel. But the law has unfortunately been altered by the statute referred to; viz. the 1 & 2 Vict. c. 110, which enacts (s. 13), that a judgment shall be a charge upon all hereditaments over which the person against whom the judgment is entered up, has any disposing power which he might, without the assent of any other person, exercise for his own benefit. It is, however, provided that nothing shall alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice. Of course, the benefit of the power of appointment is now comparatively small; although, for the reasons mentioned in the previous part of the note, the former mode of limitation must, for the present, be retained. It might be turned to advantage by using it so as to dispense with the lease for a year, but, probably, the benefit to be gained in this way will be put an end to by an act of the legislature abolishing the lease for a year, and in a few years, practitioners will return to the old mode of conveyance in fee. (See further on the subject of powers overreaching judgments, infra, Precedent XXI).

Recital of conveyance to uses to bar dower in favour of vendor.

pointment in overreaching the judgment debts of the appointor.

—altered by the stat. 1 & 2 Vict. c. 110.

It is unnecessary here to go into the question as to whether the covenants for title entered into by the appointor with the appointee run with the land. The point will be discussed in the first volume of this work, and will be the subject of future notes.

(*b*) The manner in which instruments are recited varies according to the purpose and place of the recital. In commencing the recitals, the object is to shew that, at the period at which they commence, the subject-matter of the deed stood settled or limited in the manner stated. How it became so settled or limited is of no consequence; and, therefore, the fashion of the first recital is, that by an assurance or assurances, bearing a given date, and made between given parties,

Manner of reciting instruments.

CONVEYANCE TO USES TO BAR DOWER.

1801, the release being made, or expressed to be made, between M. S., of the first part; the said A. B., of the

the property was settled or limited in the manner stated. The recital should not be, that by the assurances, the property was conveyed and assured by A. B. to C. D. to the uses stated, but merely that the property was conveyed and assured to the uses. The names of the conveying parties and the mode of conveyance are immaterial; the only thing to be considered is the result of the conveyance.

But the case is altered when we arrive at the subsequent recitals; for having shewn by our first recital, that the property was vested in A. B., the recital of the next assurance must state, not generally, that the property was conveyed, but particularly, that A. B. conveyed the property. Or, to put a more complex case, if the first recital shew that the property was limited to A. B. for life, with remainder to his first and other sons in tail; the second recital will shew who is the first tenant in tail, and that he has attained twenty-one years of age; and the third recital will shew that A. B. and such tenant in tail have conveyed, or charged, or settled the property, as the case may be. This last example proceeds, of course, on the supposition, that, for some reason, it is needful to notice the first settlement instead of commencing with the deed barring the entail.

Exception to the general rule in reciting a mortgage;

There is an exception with regard to the rule laid down for reciting the first instrument in the chain of recitals. And that arises when the first instrument recited is a mortgage, because then it is needful to shew as well who was the mortgagor, as who was the mortgagee. Hence a mortgage, even when it begins the recitals, is recited formally and according to its technical parts. In reciting a mortgage, too, the consideration is stated, as that is the primary object, but, generally, in recitals of purchase or other deeds, the consideration is not stated as being of no consequence to the effect of the deed. It is usual, however, to refer to a consideration as therein mentioned, to intimate that the deed was not voluntary. But in the general form of recital used in the beginning of deeds, no consideration is ever referred to. If the mortgage be one which several persons (as former incumbrancers who are paid off) join with the mortgagor in making, the recital may be general that the estate was conveyed by and by the direction of the mortgagor to the use of the mortgagee; the proviso for redemption will be stated formally, and will shew in whom the equity of redemption was.

—a lease.

If the subject of the principal deed be leasehold property, it is usual to recite the lease formally; there is no objection to so doing, but it is only essential in cases in which it is required to shew who the lessor is, as in the case, for example, when his consent is needed for the assignment. So, too, a will is recited formally, but only because nothing would be gained by stating the devise or gift generally.

second part; and J. D., of the third part; and by a fine sur conusance de droit come ceo &c., levied in or as of Michaelmas term, in the forty-first year of the reign of his late Majesty King George the Third, before his Majesty's justices of the court of Common Pleas at Westminster, the messuages or tenements, lands and hereditaments hereinafter particularly mentioned, and intended to be hereby appointed and released with their appurtenances (*c*), were

CONVEYANCE TO USES TO BAR DOWER.

Period of commencing recitals.

It is often very difficult to determine at what period or with what instrument the recitals should commence. They should never go further back than is absolutely necessary for shewing the origin of all the estates and interests intended to be conveyed or assured; but as a general rule, they should go sufficiently far back for that purpose. The rule is deviated from in the case of old out-standing legal estates, (see infra, page 224), and in some other cases which depend on their peculiar circumstances, and which cannot well be particularised. Experience alone will enable the draftsman to determine with readiness at what period he will commence his recitals.

When instruments are to be recited verbatim, and when according to their effect.

The manner of framing recitals of instruments is also to be considered in another light; viz. as to whether the instrument is to be recited verbatim, or whether merely the effect of it is to be stated. There is great danger of misstatement in attempting to state the effect of any instruments, except those which are strictly technical in their form and language. Hence, the general rule is to state the effect of all limitations and clauses, the effect of which is well known and certain, and in which the fashion of the recital is generally as well settled as that of the original limitation or clause; but to give the essential contents of all peculiar or untechnical instruments in the words of the original. And it is to be observed that when the draftsman professes to be reciting an instrument verbatim, he should do so exactly, and not omit or insert any words or phrases at his own discretion.

Referred to in the Introduction p. 13 —

Manner of referring to parcels.

(*c*) The parcels should be described in the recitals by reference to the subsequent description in the witnessing part, because that is the description by which the purchaser contracts to purchase. All partial or incomplete descriptions should be avoided. In case the instrument in recital affects only part of the property intended to be assured, the reference may be general as to "parts of the hereditaments hereinafter mentioned" &c.; or in case it is necessary or desirable to distinguish the different parts affected by the different instruments recited, the reference may be to the hereditaments, firstly or secondly thereinafter described, using as many numbers as may be needed, and making corresponding distinctions in the actual descriptions of the parcels. In subsequent recitals, the parcels may be dis-

CONVEYANCE TO USES TO BAR DOWER.

conveyed and assured to such uses upon such trusts, for such intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as the said A. B., by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of, and attested by two credible witnesses (*d*), should direct, limit, or appoint, and in default of, and until and subject to such direction, limitation, or appointment, to the use of the said A. B. and his assigns, during his life, with remainder to the use of the said C. D. and his heirs, during the life of the said A. B., in trust for the said A. B. and his assigns, with remainder to the use of the said A. B., his heirs and assigns: AND WHEREAS the said C. D. hath contracted and agreed with the said A. B. for the absolute purchase of the

—of agreement for purchase.

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tinguished by reference either to the witnessing part, or to the first instrument in which they are mentioned. Perhaps the best way is to preserve the uniform mode of referring to the witnessing part, unless the instrument in recital refers to the prior instrument; but, in fact, the draftsman must, in this matter, be guided principally by the circumstances, and must consider in each case how he can most conveniently make a clear reference.

When parcels are to be described in the recitals.

There are cases in which the parcels are always described in the recitals; as in assignments of leases and terms of years, policies of assurance, interests in funds, or under particular settlements, and generally in all cases in which it happens that the interest assured was created by the instrument recited. And the reason of this is obvious; for as the object of the principal deed is to assure exactly what was contained in the recited instrument, the method of attaining this is to state exactly what the instrument contained, and assure it by means of a reference. In ordinary cases, the purchaser contracts for a particular estate without any regard to what deeds it was contained in; but in the above cases, he contracts for an interest contained in and depending upon the instrument recited.

Manner of reciting an instrument which created a power.

(*d*) If it is intended to exercise the power given by an instrument in recital, (as in the present case), the words creating the power, and prescribing the manner of exercising it, should be given verbatim, in order to shew that the witnessing part is an echo of those words. But if it is not intended to exercise the power, it is proper in reciting its creation, to state merely the object and extent of the power, and to omit the manner in which it was to be exercised. If it has never been exercised, and has ceased to be exercisable, the reference may be of the most general description.

CONVEYANCE TO USES TO BAR DOWER.

said messuages or tenements, lands and hereditaments hereinafter particularly mentioned, and intended to be hereby appointed and released with their appurtenances, and the inheritance thereof in fee-simple in possession, free from incumbrances, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— to the said A. B., paid by the said C. D., at or immediately before the sealing and delivery of these presents, (the receipt of which said sum of £——, the said A. B. &c.; see Precedent XVI., p. 194), and pursuant to and by force and virtue and in exercise and execution of the power or authority to the said A. B., for this purpose given by the said indenture of the 5th day of June, 1801, as hereinbefore is mentioned (*e*), and of all other powers or authorities in anywise enabling him in this behalf, he the said A. B., doth by this present deed, or writing, by him sealed and delivered in presence of and attested by the two credible persons whose names are intended to be hereupon indorsed

Witnesseth.

Consideration.

Receipt clause.

Appointment.

(*e*) When it is intended to exercise a power, the instrument creating the power should be particularly recited; (see the preceding note), and the witnessing part, which purports to exercise the power, should contain a clear reference to it. (See 1 Sugd. Pow. 243). The form in the text is that in general use for this purpose, and in all well drawn instruments is substantially the same. It always contains the clause referring to all other powers, enabling the appointor in that behalf.

Manner of exercising a power.

The form of appointment, too, always describes the manner in which the deed is to be executed, in terms which are the exact echo of the words contained in the instrument creating the power. (See the exercise of other powers, infra, Precedents XXI. XXIX.). This practice is sanctioned by invariable custom, but it does appear absurd, to make an instrument describe the mode of its own intended execution; and, perhaps, the most that can be said for the practice is, that it serves the solicitor as a guide in preparing the attestation clauses. It seems, however, that a defect in the language of an attestation clause may be aided by expressions in a clause in the body of the deed; (*Buller* v. *Burt*, 4 Ad. & Ell. 15; *Doe* d. *Spilsbury* v. *Burdett*, 4 Ad. & Ell. 1; see, too, *Allen* v. *Bradshaw*, 1 Curteis, 110); and it might, perhaps, be contended, that the same aid could be derived from the language of this part of the deed, at least, if the words "intended to be" were omitted.

CONVEYANCE TO USES TO BAR DOWER.

as witnesses to the sealing and delivery of these presents, by him the said A. B., direct, limit, and appoint, that the messuages or tenements, lands, and hereditaments, hereinafter particularly mentioned, and intended to be hereby released (*f*), with their appurtenances, shall henceforth go, remain, and be to the uses upon the trusts, and subject to the power hereinafter limited, declared, and contained (*g*): AND THIS INDENTURE ALSO WITNESSETH,

Operative words.

Witnesseth, secondly, grant and release.

Locus of parcels.

(*f*) When there is an appointment, and also a release, operating on the same property in the same instrument, the appointment is made by the first witnessing part, and the release by the second. In this case, the parcels are described in the appointment by reference to the subsequent description in the release.

Form of deed of appointment and conveyance.

(*g*) When a man has both a power and an interest, and exercises his power, and also conveys his interest, these objects should be accomplished by two separate witnessing parts, with a subsequent declaration of uses, as in the Precedent in the text. It is, however, very common in ill-drawn instruments, to find the appointment and release blended in one witnessing part, by way of appointment and conveyance to the releasee. If it be a conveyance in fee simple to and to the use of the releasee, no evil ensues, because, one way or the other, he gets the legal estate; but, if it be intended to declare uses on the seisin of the releasee, a difficulty arises. For, an appointment to A. B. is, in effect, an appointment to the use of A. B., and vests the legal estate in him, rendering the uses subsequently declared, mere equitable estates; whereas the release to A. B. merely gives him the seisin to serve the legal uses declared. It appears to be well settled, that such an instrument shall be taken, either as an appointment, or as a release, according as the intention of the parties seems to require. (*Cox* v. *Chamberlain*, 4 Ves. 631; *Roach* v. *Wadham*, 6 East, 289; *Wynne* v. *Griffith*, 3 Bing. 179; S. C. 10 Moo. 592; 5 B. & C. 923; 8 Dow. & Ry. 470; 1 Russ. 283; *Farmer* v. *Bradford*, 3 Russ. 354); but the question, what is the intention of the parties, is often very difficult to determine. (See the cases, supra, and 1 Sugd. Pow. 451).

It is the business of the draftsman so to frame his draft, as to prevent these questions arising, and he is to accomplish this by keeping his appointment and conveyance quite distinct, and declaring the uses independently and distinctly. Where, however, brevity is much desired, and the purchaser is to take the fee simple, there is no other objection to the blending of the appointment and release, except the informality of the assurance. Perhaps, in such cases, the best way is, to dispense with the release altogether.

CONVEYANCE TO USES TO BAR DOWER.

that, for the considerations aforesaid, and for further assuring the said messuage or tenement, lands, and hereditaments, with their appurtenances, to the uses, and in manner hereinafter mentioned, he the said A. B., hath granted, aliened, released, and confirmed, and by these presents doth &c. unto the said C. D., (in his actual possession, &c. see Precedent, XVI. p. 198), and his heirs; ALL, &c., [*parcels*], TOGETHER WITH ALL and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof; mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances (*h*) whatsoever, to the said

Operative words.

Lease for a year.

Parcels.

General words for messuages and lands.

(*h*) The law, with regard to commons, easements, and appurtenances, will be found succinctly stated in Burton's Law of Real Property, ch. vi. s. 3, and at greater length in Cruise's Digest, Vol. iii. Titles xxiii, xxiv, xxvii. It seems, that the species of common, called *common by reason of vicinage*, which is not specified in the general words, is merely an excuse for trespass, and may be put an end to by inclosures. (*Wells* v. *Pearcy*, 1 Bing. N. C. 556; *Heath* v. *Elliott*, 4 Bing. N. C. 388).

General words.

The law, with regard to claims by prescription to commons and easements, now depends chiefly on the statute 2 & 3 Will. 4, c. 71. Several decisions have been already made on the different sections of the statute, of which the principal are, *Bailey* v. *Appleyard*, 3 Nev. & Per. 357; *Bright* v. *Walker*, 1 C. M. & R. 211; *Jones* v. *Price*, 3 Bing. N. C. 53; *Richards* v. *Fry*, 3 Nev. & Per. 67; *Beasley* v. *Clark*, 2 Bing. N. C. 705; *Tickle* v. *Brown*, 4 Ad. & Ell. 369; *Wright* v. *Williams*, 1 Mee. & Wels. 77.

Easements, &c. by prescription.

Where there is a unity of seisin or possession in the same person of any land, and of an easement in or over the land, the easement is either extinguished or suspended, according to the duration of the respective estates, in the land and the easement; and after such extinguishment, or during such suspension, the easement cannot pass as *appurtenant*, under the general words. And in the case of such unity of seisin or possession as aforesaid, in order to pass an easement existing in point of use, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the easement in question, as one used and enjoyed with the

Extinction of easement by unity of seisin.

CONVEYANCE TO USES TO BAR DOWER.

messuages or tenements, lands, hereditaments, and premises belonging, or in anywise appertaining, or with the same, or any of them respectively, now, or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any of them, or any part of them, or appurtenant thereto, with their and every of their appurtenances: AND THE REVERSION and reversions, remainder and remainders, yearly, and other rents, issues, and profits, of all and singular the said messuages or tenements, and hereditaments, and premises, hereby granted and released, or intended so to be: AND ALL THE ESTATE, right, title, interest, inheritance, reversion, use, trust, possession, property, claim, and demand whatsoever, both at law and in equity, of him the said A. B., of, in, to, out of, and upon the same premises, and every part and parcel thereof; TO HAVE and TO HOLD the said messuages or tenements, lands, and hereditaments, and all and singular other the premises hereby granted and released, or expressed, or intended so to be unto the said C. D., and his heirs, to the uses, upon the trusts, and subject to the power hereinafter limited, declared, and contained: AND IT IS HEREBY agreed and declared between and by the parties to these presents, that the direction, limitation, and appointment, and the grant and release hereinbefore contained, shall respectively operate and enure TO SUCH USES, upon and for such trusts, intents, and purposes, and with, under, and subject to shch powers, provisoes, and declarations as the said C. D. shall, by any deed or deeds, with or without power of revocation and new appointment (*i*), from time to time

And the reversion, &c.

And all the estate, &c.

Habendum.

Declaration of common uses to bar dower,

—being to such uses as purchaser shall appoint;

land, which is the subject of the conveyance. (*James* v. *Plant*, 4 Ad. & Ell. 749; S. C. *nom. Plant* v. *James*, 5 B & Ad. 791; see, too, *Barlow* v. *Rhodes*, 1 Cro. & Mee. 439; *Bower* v. *Hill*, 2 Bing. N. C. 339; *Thomas* v. *Thomas*, 2 C. M. & R. 34; see, too, ante, page 200, note (*n*)).

No mode of execution should be prescribed.

(*i*) It is usual to prescribe a particular mode of execution of the power, (see the form ante, page 210). But this is wrong; for, although in the case of powers to overreach or defeat the uses of a settlement, it is proper to direct, that the power shall be exercised with certain formalities in order to secure due deliberation, and guard against

direct, limit, or appoint; AND IN DEFAULT of, and until such direction, limitation, or appointment, and so far as no such direction, limitation, or appointment shall extend to the use of the said C. D. and his assigns during his life without impeachment of waste, AND AFTER the determination of that estate by forfeiture, or otherwise, in his lifetime, to the use of the said E. F. and his heirs, during the (*k*) life of the said C. D. in trust, for him and his assigns, and to prevent the present wife (if any) (*l*) of the said C. D. from being entitled to her dower, out of or in the said premises, or any part thereof; AND AFTER the determination of the estate so limited in use to the said E. F. and his heirs, during the life of the said C. D. as aforesaid, to the use of the said C. D. (*m*), his heirs and assigns, for ever; AND THE SAID C. D. doth hereby declare, that if he shall

CONVEYANCE TO USES TO BAR DOWER.

—in default to purchaser for life;

—with limitation to trustee for life of purchaser, in trust for him;

—with remainder to purchaser in fee.

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fraud; yet, when the sole intention is to facilitate the disposal of the estate by the donee of the power—that donee taking the whole interest in default of appointment—it is manifest that the power ought not to be clogged with any restrictions.

The power should not extend to appoint by will.

The power in the text is sometimes extended to appointments by will; but this likewise is an error, for the donee of the power having the whole fee in reversion on his own death, can dispose of it by will, and the introduction of the power only gives rise to the question, whether the will was an execution of the power or conveyance of the interest. And, as the solution of the question depends on the presumed intention of the testator, and to collect that intention from the will is generally a matter of great difficulty, every thing that may create a doubt on the subject should be eschewed. (See 1 Sugd. Pow. 430—451).

(*k*) Instead of limiting the estate to the trustee and his heirs, it is sometimes limited to him, his executors, and administrators; the estate limited being pur auter vie, the executors or administrators take as special occupants. (See 1 Sugd. Pow. 245).

(*l*) If to the draftsman's knowledge the purchaser be married, the words "if any" will be superfluous.

(*m*) The limitation is occasionally "to the use of the heirs and assigns of the said C. D.," which, by virtue of the well-known rule in Shelley's case, gives C. D. the estate in fee subject to the prior limitations; but there seems no occasion for resorting to this method of accomplishing an object, which may be effected by an express limitation.

CONVEYANCE TO USES TO BAR DOWER.

Declaration by purchaser to bar his widow of dower.

Covenants by vendor that power was well created,

—and is in force;

—for right to appoint and convey;

—for quiet enjoyment;

—free from incumbrances;

die, leaving a widow, such widow shall not be entitled to her dower out of or in the said premises, or any part thereof; AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and his heirs, in manner following; (that is to say), that for and notwithstanding any act, deed, matter, or thing by him the said A. B. made, done, committed, or executed, or knowingly or willingly suffered to the contrary, the power or authority hereinbefore exercised by the said A. B., or expressed and intended so to be, was well and effectually created, and the same at the sealing and delivery of these presents is in full force and virtue, and in nowise suspended, extinguished, weakened, or become void: AND THAT, for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to direct, limit, and appoint; and also to grant, alien, release, and confirm the said hereditaments and premises hereinbefore appointed and released, or expressed, and intended so to be to the uses and in manner aforesaid, according to the true intent and meaning of these presents; AND THAT the said hereditaments and premises hereinbefore appointed and released or expressed, and intended so to be, shall, from time to time, and at all times hereafter, go, remain, and be to the uses, upon the trusts, and with, under, and subject to the power hereinbefore limited and declared of and concerning the same, and be peaceably and quietly entered into and upon, and be held possessed, occupied, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by him the said A. B., or his heirs, or of or by any other person or persons lawfully or equitably claiming, or to claim by, from, or under, or in trust for him, them, or any of them; AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged, or otherwise, by him the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified

of, from, and against all and all manner of former and other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B., or his heirs, or by any other person or persons lawfully or equitably claiming or to claim, by, from, under, or in trust for him, them, or any of them: AND FURTHER, that the said A. B. and his heirs, and all and every other person or persons having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for him the said A. B., or his heirs, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said C. D., his heirs, appointees, or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, things, devices, appointments, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely appointing, conveying and assuring of the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, and every part thereof, to the uses and in manner aforesaid, as by the said C. D., his heirs, appointees, or assigns, or his or their counsel in the law shall be reasonably advised or devised and required. IN WITNESS &c.

CONVEYANCE TO USES TO BAR DOWER.

—for further assurance.

XVIII.

BARGAIN *and* SALE (*a*)

XIX.

FEOFFMENT.

FEOFFMENT (*b*).

Parties. THIS INDENTURE, made &c., BETWEEN A. B., of &c. [*vendor*], of the first part; C. D., of &c. [*purchaser*], of the second part; E. F., of &c. [*attorney to deliver seisin*], of the third part; G. H., of &c. [*attorney to receive possession*], of the fourth part; [*recites contract as in Precedent XVI., p. 193, substituting for* "released," "granted and enfeoffed"]: NOW THIS INDENTURE WITNESS-

Recitals.

(*a*) No precedent has been given of a bargain and sale, as it is a form of conveyance which is hardly ever used at the present day. If, however, for any reason it be required to frame one, the object may be easily accomplished by means of Precedent XVI., by using the operative words "bargain and sell," instead of "grant, alien, and release." Of course, the references in the habendum and covenants will need corresponding alterations. With respect, generally, to bargains and sales, see 2 Saund. on Uses, 43; 4 Cruise, Digest, 97.

(*b*) Feoffments are occasionally, but very rarely, used; they are most common in small transactions in the country, when the parties live on the spot and it is desired to avoid the expense of the lease for a year. The only peculiarity in the instrument is the introduction of the appointment of the attornies to deliver seisin, and receive possession, and the indorsement of the memorandum of livery of seisin. If the parties intend to deliver seisin and take possession themselves, the appointment of the attornies will be omitted. With respect to feoffments generally, see 2 Saund. on Uses; 4 Cruise, Digest, 46.

ETH, that, in consideration &c., [*as in Precedent XVI., p.* 194], he the said A. B., hath granted, aliened, enfeoffed, and confirmed, by these presents doth grant, alien, enfeoff, and confirm unto the said C. D. and his heirs, ALL, &c. [*parcels—general words*], TO HAVE AND TO HOLD the said pieces of land and hereditaments, and all and singular other the premises hereinbefore granted and enfeoffed, or expressed and intended so to be, unto the said C. D., his heirs and assigns, to the use of the said C. D., his heirs and assigns, for ever; [*covenants for title as in Precedent XVI., substituting* "granted and enfeoffed," *for* "released," *and omitting the words referring to the wife*]: AND THE SAID A. B. hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said E. F., the true and lawful attorney of and for him the said A. B., and in his name and stead, to enter into and take full and quiet possession and seisin of all and singular the said pieces of land and hereditaments, or of any part thereof, in the name of the whole, and then to deliver full, quiet, and peaceable possession and seisin of all and singular the same hereditaments, or any part thereof, in the name of the whole, unto the said C. D., or to the said G. H., his attorney hereinafter in that behalf lawfully authorized according to the form and effect, and the true intent and meaning of these presents: AND THE SAID C. D. hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said G. H. the true and lawful attorney of and for him the said C. D., and in his name and stead to enter into and upon the said pieces or parcels of land and hereditaments, or any part thereof, in the name of the whole, and then to receive and take of and from the said A. B., or his said attorney, full, peaceable, and quiet possession and seisin of all and singular the said hereditaments, or of any part thereof, in the name of the whole, and such possession and seisin so taken to hold unto and to the use of the said C. D., his heirs and assigns, according to the form and effect, and the true intent and meaning of these presents. IN WITNESS &c.

FEOFFMENT.

Witnesseth.

Habendum.

Covenants for title.

Appointment of attorney to deliver seisin.

Appointment of attorney to receive possession.

FEOFFMENT.

MEMORANDUM *of* LIVERY *of* SEISIN.

Memorandum of livery of seisin.

BE IT REMEMBERED that, on this —— day of ——, in the year first within written, the within named E. F. as the attorney of and for the within named A. B., and in his name and stead, did enter into and take full, quiet, and peaceable possession and seisin of the within mentioned pieces of land and hereditaments, and did then deliver full, quiet, and peaceable possession of the same, unto the within named G. H., as the attorney in that behalf of and for the within named C. D., to hold unto and to the use of the said C. D., his heirs and assigns, according to the form and effect, and the true intent and meaning of the within written indenture, in the presence of us,

} *Witnesses.*

XX.

COVENANT TO STAND SEISED.

COVENANT *to* STAND SEISED (*a*).

(*a*) This form of conveyance is altogether obsolete, and for that reason no precedent of it is given. The nature and operation of a covenant to stand seised are explained in 2 Saund. on Uses, 79; 4 Cru. Digest, 106.

XXI.

CONVEYANCE *by* APPOINTMENT *under a* POWER *of* SALE *in a* SETTLEMENT, *of a* MANOR *and other freehold Estate to Uses to bar Dower; the Purchase having been made at an* AUCTION *through an* AGENT *who is a Party to the Conveyance.*

CONVEYANCE UNDER A POWER OF SALE.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*trustee of the power*], of the first part; C. D., of &c. [*tenant for life in possession under the settlement*], of the second part; G. H., of &c. [*agent and also trustee*], of the third part; and E. F., of &c. [*purchaser*], of the fourth part; WHEREAS, by an indenture of bargain and sale, and settlement, bearing date the 12th day of May, 1814, perfected by inrolment, and made or expressed to be made between [*the parties*], and by a common recovery, duly suffered in pursuance of the same indenture in Easter term (*a*), in the 54th year of the reign of his late Majesty King George the Third, before his Majesty's justices of the court of Common Pleas at Westminster, the manor, lands, and other hereditaments hereinafter particularly mentioned, and intended to be hereby appointed, were (among other hereditaments) conveyed, and assured, and limited, (subject to certain sums of money then charged upon the same premises, or some parts thereof, and which have since been duly released), to the use of such person or persons, and for such estate or estates, upon such trusts, and for such

Parties.

Recital of settlement by recovery, and bargain and sale.

(*a*) A recovery cannot be suffered out of term, but a fine may be levied in vacation and recorded as of the preceding term; (Burton's Law of Real Property, Art. 109, 110, p. 37); and hence, in reciting a fine, it is always described as levied "in or as of —— term," while a recovery is recited to have been suffered "in —— term."

Recital of fines and recoveries.

CONVEYANCE UNDER A POWER OF SALE.

intents and purposes, and with, under, and subject to such powers, provisoes, limitations, charges, and declarations, and in such manner and form in all respects as the said (*b*) I. K. and L. M. should, in manner in the said indenture mentioned, direct, limit, or appoint, and in default of, and until and subject to such direction, limitation, or appointment, to the use of the said I. K. and her assigns, for her life, without impeachment of waste, with remainder to the use of the said A. B. and N. O., and their heirs, during the life of the said I. K., in trust for her and her assigns, and to preserve contingent remainders, with remainder to the use of such person or persons &c. [*ut supra*], as the said L. M. alone should, in manner in the said indenture mentioned, by deed or will, direct, limit, or appoint, and in default of, and until, and subject to such last mentioned direction, limitation, or appointment, to the use of the said L. M. and his assigns, for his life, without impeachment of waste, with remainder to the use of the said A. B. and N. O., during the life of the said L. M., in trust for him and his assigns, and to preserve contingent remainders, with remainder to the use of the said C. D., (then an infant under the age of twenty-one years), and his assigns for his life, without impeachment of waste, with remainder to the use of the said A. B. and N. O., and their heirs, during the life of the said C. D., in trust for him and his assigns, and to preserve contingent remainders, with divers remainders over (*c*): AND in the said indenture was contained a

Recital of the power of sale in the settlement.

(*b*) I. K. and L. M. are called "the said," as having in the complete recital, been mentioned among the parties to the bargain and sale.

Extent to which the limitations and clauses of settlements are to be recited.

(*c*) As the object of narrative recitals is to explain the interest which the parties to the principal deed have in the intended subject-matter thereof, it is requisite to set forth so many only of the limitations, powers, and provisoes of a settlement as are sufficient for that purpose. Thus, in the present case, the operation to be effected, is that of making a conveyance under a power of sale which is to be exercised by the trustees for preserving contingent remainders, but with the consent of the tenant for life for the time being. Hence, the limitations to be recited are all those which precede the limit-

power for the said A. B. and N. O., and the survivor of them &c., [*the power of sale including the power to the*

CONVEYANCE UNDER A POWER OF SALE.

ation to the actual tenant for life, together with the limitations to that tenant for life and his trustees. The subsequent limitations are of no moment, because we are about to exercise a power which overreaches them, whatever they may be, and we have already shewn who are the parties to exercise and consent to the exercise of the power. We have then to set forth the power; and this should be done verbatim, except as to the change of tense, which a recital requires, and except as to the omission of one of the auxiliary verbs, when they are twice repeated. Thus, "shall and may," becomes "should" or "might;" "do and and shall," becomes "should," and so forth. In other respects, not a word of the power should be altered, and the recital should always state fully and exactly, the power to the trustees to give receipts. The subsequent clauses providing for the disposition and investment of purchase-money, are then seen to be of no importance to the purchaser, and should be omitted. The recital of the settlement is followed, it will be seen, by the recitals of the deaths of parties, and of other circumstances which shew who are the persons, who at the date of the principal deed, are entitled under the settlement to effect a sale.

Numerous examples will be found in the course of these precedents, of the extent to which, in different cases, the recitals of limitations are to be carried. If a tenant in tail is the person about to deal with the estate, the recitals will come down to and include the limitation under which he takes, and the subsequent limitations will shew the determination or failure of all prior estates. If the vendor claim under an ultimate limitation in fee, the recitals will embrace the whole chain of limitations, and will shew that all except the last, have determined or failed, and that the vendor is the person entitled under the ultimate limitation. And similarly in other cases.

Occasionally, for particular cases, a more brief form of recital may be used. If the limitations are long and intricate, the recital may be that the estate was "conveyed and assured (subject to certain preceding uses and estates which have all since determined or failed of taking effect) to the use of the said A. B., &c." But this method is less intelligible and satisfactory than that in ordinary use, and does not answer the purpose of preserving in the title deeds a distinct narrative of the events on which the title depends. It is not to be employed for common cases.

Sometimes, as in stating the creation of a satisfied term, the recital may conveniently and properly be that by such an assurance the estate was "conveyed and assured to the uses and limitations therein limited and contained, including a limitation to the use of A. B. and C. D., their executors, administrators, and assigns, for the term of

CONVEYANCE UNDER A POWER OF SALE.

trustees or trustee to give receipts for the purchase-money, is to be recited verbatim; the power in this case, it will be seen, was to be exercised at the request and by the direction of the tenant for life in possession]: AND WHEREAS the said L. M. died (*d*) in or about the month of April, 1819, without having joined with the said I. K. in exercising the joint power of appointment by the said indenture limited to the said I. K. and L. M., as aforesaid, and without having exercised the power of appointment by the same indenture limited to the said L. M. alone, as aforesaid: AND WHEREAS the said N. O. died in or about the month of October, 1827, and the said I. K. died in or about the month of June, 1828: AND WHEREAS the said C. D. attained his age of twenty-one years, in or about the month of May, 1830: AND WHEREAS the land tax charged upon the said hereditaments hereinafter particularly mentioned and intended to be hereby appointed, has been redeemed: AND WHEREAS, by an indenture of release, (indorsed on the said indenture of the 12th day of May, 1814), bearing date the 2nd day of March, 1834, grounded on a lease for a year, and made, or expressed to be made between [*the parties*] after certain recitals, whereby it appeared that the legal estate of inheritance of and in the said manor, lands, and hereditaments hereinafter particularly mentioned, and intended to be hereby appointed, was outstanding prior to the date of the said indenture of the 12th May, 1814, and before the date of the said indenture now in recital had become and was vested in the said P. Q. (*e*). It was witnessed, that, for the con-

—of death of L. M. without having exercised his powers;

—of deaths of N. O. and I. K.;

—of C. D., being of age;

—of land tax having been redeemed;

—of re-conveyance of an outstanding legal estate:

—— years, upon the trusts therein mentioned, and which have all since been satisfied and carried into effect."

The limits of this work will not allow of any further observation on this subject, although it is one of great importance; but the reader will derive considerable information on it from an examination of the precedents.

(*d*) The usual expression in drafts is "departed this life," but there seems to be no advantage in using three words where one will do. "Died" is certainly less euphonious than "departed this life;" but it states the fact quite as distinctly, and more concisely.

(*e*) A recital of this form may be used in most similar cases with

siderations therein mentioned, the said P. Q. did release unto the said R. S. and his heirs, (amongst other hereditaments), the said manor, lands, and other hereditaments hereinafter particularly mentioned, and intended to be hereby appointed with their appurtenances to hold the same unto the said R. S. and his heirs, to such of the uses, upon such of the trusts, to and for such of the intents and purposes, and with, under, and subject to such of the powers, provisoes, agreements, and declarations in and by the said indenture of the 12th day of May, expressed, limited, declared, and contained of and concerning the said hereditaments as were at the date of the said indenture now in recital subsisting, and capable of taking effect: AND WHEREAS the said A. B., pursuant to the power of sale in him reposed as hereinbefore is recited, and at the request and by the direction of the said C. D., (signified by this writing under his hand) (*f*), advertised to be sold and put up for sale by public auction on the 13th day of November, 1833, the manor, lands, and other hereditaments hereinafter particularly mentioned, and intended to be hereby appointed, together with certain other hereditaments, comprised in the said indenture of the 12th day of May, 1814, in fourteen lots, by a particular of sale, (the eighth lot comprising the said manor, lands, and hereditaments intended to be hereby appointed), and subject to certain conditions of sale, one of which was, that the respective purchasers should take to the timber and trees growing on the several lots at a price to be determined by a valuation as therein mentioned, and that the value of such timber and trees should be paid at the time of completion of the respective purchases, in addition to the purchase-money (*g*): AND WHEREAS, at the said sale, the

CONVEYANCE UNDER A POWER OF SALE.

—of sale,

—of purchase and payment of deposit;

great advantage, for otherwise, it would be necessary to carry back the commencement of the recitals to the period at which the legal estate became outstanding—frequently forty years or more before the date of the conveyance.

(*f*) As to the necessity of a request being made *previous* to the sale, see the note infra, on the precedent of a deed of that nature.

(*g*) In cases of sales by trustees, mortgagees, and other persons In what cases

CONVEYANCE UNDER A POWER OF SALE.

said G. H. was the highest bidder for, and was declared the purchaser of, the hereditaments comprised in the said eighth lot, at or for the price or sum of £1,600, and immediately after the said sale the said G. H. paid the sum of £160 to or on account of the said A. B., by way of deposit, and in part payment of the said sum of £1,600: AND WHEREAS the timber on the said eighth lot was duly valued

—of valuation of timber;

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the manner of sale is to be recited.

not having the whole beneficial interest, it is usual to recite the manner in which the sale was made. (See infra, Precedent XXX. note (*b*)). If the sale be by private contract, the recital is the same as in a sale by the beneficial owners, but if the sale be by auction, a recital is introduced to the effect of that in the text. The object is to shew that the trust or power was duly pursued, and that the sale was fairly conducted. But when the vendors' power is to sell either by auction or by private contract at their discretion, a reference to the sale by auction is not essential, and is not perhaps desirable; for a reference to a sale by auction may lead to inquiries as to the nature of the conditions of sale, and it may turn out that the conditions were improper and unauthorized by the trust. (See note on Conditions of Sale by trustees, ante, page 95).

Certainly, however, the practice is to refer to the sale by auction in conveyances on sales under trusts or powers; and when the purchase is made by an agent, he (being the person with whom the trustees have contracted) should join in the conveyance for the purpose of authorizing them to convey to his principal. In conveyances on sales by the beneficial owner, no reference to the manner of sale should be made, and the contract for sale should be stated in the usual form. In that case, the price of timber or fixtures (if taken under a valuation) will be blended with the purchase-money, and treated as one entire sum. It is sometimes proposed, not to state in the deed the consideration for the timber or fixtures, and to omit all reference to them with a view to diminishing the ad valorem stamp duty. But there can be very little doubt, that so doing would subject the parties to the penalty for not stating the true consideration; although, certainly, the omission would not affect the validity of the deed. If the sale be under a trust or a power, it is still more desirable to state the price of timber and fixtures, and incorporate it with the purchase-money, in order to obtain an effectual receipt for it in the deed of conveyance.

Price of timber and fixtures part of purchase-money.

Price of chattels should be severed.

If any part of the property sold be furniture or other chattels which pass by delivery, the price for them should always be apportioned, and there should be a recital that they have been delivered to the purchaser, in order to estop the vendor from afterwards alleging the contrary. (See ante, page 104, note (*b*)).

in pursuance of the said condition of sale at the sum of £200: AND WHEREAS the said purchase was made by the said G. H. as agent for the said E. F., and the said sum of £160 so paid by way of deposit as aforesaid was money belonging to the said E. F. (*h*): NOW THIS INDENTURE WITNESSETH, that, for effectuating the said sale, and in consideration of the said sum of £160 paid by the said G. H., for and on behalf of the said E. F., by way of deposit as hereinbefore mentioned, and also in consideration of the sums of £1,440 and £200, at or immediately before the sealing and delivery of these presents to the said A. B., paid by the said E. F., (the receipt of which said sums of £160 and 1,440, making together the said purchase-money or sum of £1,600, and also of the said sum of £200, the price of the said timber; he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof, doth acquit, release, and discharge the

CONVEYANCE UNDER A POWER OF SALE.

—of the purchase having been made by an agent;

Witnesseth.

Consideration.

Receipt clause.

(*h*) It often happens that some of the lots are not purchased at the auction, and are afterwards bought by reference to the particular of sale. (See ante, pages 37, 38). If it happens that the same person has bought part of the estate at the sale by auction, and another part afterwards by private contract, and takes a conveyance of both parts by the same deed, the following recital will be required.

Recital when a purchaser at the auction afterwards buys another lot.

"And whereas the lands and hereditaments comprised in the —— lot of the said particular were not sold at the said auction, and the said A. B., in further pursuance of the power of sale in him reposed as hereinbefore is mentioned, and at the request and by the direction of the said C. D., (signified as aforesaid), hath contracted with the said E. F. for the absolute sale to him of the lands and hereditaments comprised in the said —— lot, (being the lands and hereditaments secondly hereinafter particularly mentioned, and intended to be hereby appointed), and the inheritance thereof in fee simple, in possession, free from incumbrances, at or for the price or sum of £——."

In this case, the hereditaments in the eighth lot may be referred to as the hereditaments firstly hereinafter mentioned, and the necessary alterations as to timber, amount of purchase-money, &c., should be attended to.

CONVEYANCE UNDER A POWER OF SALE.

Reference to power.

said E. F. and also the said G. H., their and each of their heirs, executors, administrators, and assigns for ever, by these presents), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to the said A. B. for this purpose given or limited by the said indenture of the 12th day of May, 1814, and the said indentures of lease and release by reference thereto as hereinbefore is mentioned, and of all other powers or authorities in anywise enabling him in this behalf, and at the request, and by the direction of the said C. D., (signified by this writing under his hand)(*i*); he, the said A. B., doth, by this

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Effect of judgments against a tenant for life, as regards the operation of a power of sale and exchange.

(*i*) By the stat. 1 & 2 Vict. c. 110, s. 113, it is enacted, that a judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's superior courts of Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power *which he might, without the assent of any other person, exercise for his own benefit*, and shall be binding as against the person against whom such judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same, with the amount of such judgment debt, and interest thereon.

Now, it is settled, that an interest created out of a life estate cannot be defeated by the execution of a power of sale and exchange, where it is to be exercised by the tenant for life, or with his consent, for he cannot derogate from his own grant; (1 Sugd. Pow. c. 11, s. 3. c. 116); and, therefore, it has been suggested, that if judgments be entered up against a tenant for life, they cannot now be defeated by

present deed, or instrument in writing, by him the said A. B., sealed and delivered in the presence of, and attested by the two credible persons whose names are intended to

CONVEYANCE UNDER A POWER OF SALE.

Revocation of uses of settlement.

the exercise of a power of sale exerciseable by him, or with his consent. The argument is, that the judgment being by the statute made a charge on the land, and binding on the person against whom it is entered up, is such a charge on the life estate as to come within the general rule above mentioned, and thus indirectly to preclude the tenant for life from availing himself of the power in order to defeat the judgment. But, it is submitted, that this view is erroneous; for the judgment is a charge only by virtue of the statute, and the statute enacts, that it shall be a charge upon hereditaments over which the person against whom it is entered up shall have "any disposing power which he might, without the assent of any other person, exercise for his own benefit;" the common power of sale and exchange cannot, however, be exercised by the tenant for life without the assent of the trustees, and therefore, is not such a power as is intended by the act; and to hold that the subsequent declaration of the statute, that the judgment shall be binding against the person against whom it is entered up, can affect the right of a tenant for life to consent to the exercise of a power, is to give an indirect operation to the act, which the expressions contained in it relating to powers do not warrant; in the ordinary meaning of words, the act renders subject to judgments the lands of such persons only as have powers equivalent to the absolute ownership of the estate or interest subjected to the powers. The charge created by the act being an equitable charge, will, perhaps, be considered not to affect the legal exercise or operation of the power, and as only binding the life estate in equity.

The late insolvent act 7 Geo. 4, c. 57, s. 22, empowered assignees to execute all powers vested in the insolvent, or created for his use or benefit, which such insolvent might execute for his own benefit. And in a recent case, where lands were settled to such uses as W. D. and F. his wife should appoint, and in default of appointment to the use of W. D. for life, with remainders over, with the ultimate remainder to W. D. in fee; and in 1824, W. D. took the benefit of the act, and conveyed all his interest to the assignees; and in 1828, he and his wife, by virtue of their power, appointed the estate to trustees; it was held, that the power was not revoked by the conveyance to the assignees, and that the appointment operated on the whole estate except the life estate, and reversion in fee previously conveyed by the insolvent. (*Jones* v. *Winwood*, 3 Mee. & Wels, 653. See, too, the cases under the Bankrupt Act, 1 Sugd. Pow. 79, 80; *Hole* v. *Escott*, 2 Keen, 444, reversed by the Lord Chancellor, November 24, 1838).

CONVEYANCE UNDER A POWER OF SALE.

be hereupon indorsed, as witnesses attesting the sealing and delivery of these presents, by him the said A. B., revoke, determine, and make void (*j*), all and every of the uses, estates, trusts, powers, provisoes, and limitations, in and by the said indenture of the 12th day of May, 1814, and the said indenture of release, by reference thereto, expressed, limited, declared, and contained of and concerning the manor, lands, and other hereditaments hereinafter particularly mentioned, and intended to be hereby appointed: AND THIS INDENTURE ALSO WITNESSETH, that, for further effectuating the said sale, and for the considerations aforesaid, and pursuant to and by force and virtue, and in exercise and execution of the power or authority to the said A. B., for this purpose given or limited by the said indenture of the 12th day of May, 1814; and the said indentures of lease and release, by reference thereto, as hereinbefore is mentioned, and of all other powers or authorities in anywise enabling him in

Witnesseth secondly. Reference to power.

Manner of exercising a power of sale in a settlement.

(*j*) The terms and operative words of the power should be rigidly adhered to, and all consents and requests which are necessary should be expressed. If the power were, "to make sale and dispose of," the witnessing part should be, that the trustees do "make sale and dispose of;" if the power were, that the trustees should "bargain and sell," these words should be employed in the witnessing part, and so, in all cases, the words used in the power should be employed in its execution.

"A power to appoint, includes in itself a power to revoke, and a power to do an act which can only be effected by an appointment, authorizes an appointment, and, therefore, a revocation. Whatever, for example, be the form in which a power of sale is given, it will operate as a power of revocation and new appointment, and may be executed accordingly." (1 Sugd. Pow. 250; *Bishop of Oxford* v. *Leighton*, 2 Vern. 367). It is usual in practice, to exercise a power of sale, by revoking the old, and appointing to the new uses; but it is not essential to do so, unless the power expressly be to revoke the old uses, and then to appoint new uses, as the purchaser directs. And it is by no means needful to have distinct witnessing parts for the revocation and appointment, unless the powers for the two operations are given in different terms.

The power to appoint is sometimes excepted from the revocation; but this is superfluous, for the exception is necessarily implied, by the nature of the power and of the instrument.

this behalf, and at the request, and by the direction of the said C. D., (signified as aforesaid), and with the privity and consent of the said G. H., (testified by his being a party to, and executing these presents), he the said A. B. doth, by this present deed or instrument in writing, by him the said A. B. sealed and delivered, and intended to be attested as hereinbefore is mentioned, limit, declare, and appoint, that ALL THAT the manor or lordship, or reputed manor or lordship of ——, in the county of ——, and all those several pieces or parcels of land, &c. [*parcels*]; together with all and singular (*k*), meadows, pastures, heaths, moors, marshes, wastes, waste grounds, folds, fold courses, and liberty of foldage, feedings, parks, warrens, commons, common of pasture, common of turbary, mines, minerals, quarries, mills, multures, customs, tolls, duties, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, fishings, fisheries (*l*), fowlings, warrens, courts leet, courts baron, and other courts, view of frankpledge, and all that to view of frankpledge doth belong, reliefs, heriots, fines, sums of money, amercements, goods and chattels of felons and fugitives, felons of themselves, outlawed persons, deodands, waifs (*m*), estrays, chief rents, quit-rents, rents-charge, rents-seck, rents of assize, fee-farm-rents, boons, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever,

CONVEYANCE UNDER A POWER OF SALE.

Appointment.

Parcels.

General words for manors and lands.

(*k*) With regard to the rights and appurtenances of manors, information will be found in Burton's Law of Real Property, ch. vi. s. 1, and page 385, Art. 1160, 1164. (Cru. Dig. Vol. iii. Tit. xxvii.). If houses are part of the property conveyed, some additional general words should be taken from those in the preceding form, and inserted in the proper place.

General words for manors.

(*l*) See the works mentioned in the preceding note, and *The Duke of Somerset* v. *Fogwell*, 5 B. & C. 875, with regard to fishery and rights of fishing; and in respect of Warrens, see *Morris* v. *Dimes*, 1 Ad. & Ell. 654.

Fishery and warren.

(*m*) In some cases it may be desirable to add "wrecks." (See Cru. Dig. Tit. xxvii. ss. 59, 64; *Talbot* v. *Lewis*, 1 Cro. Mee. & Ros. 494). A ferry, too, is a franchise, (*Huzzey* v. *Field*, 2 Cro. Mee. & Ros. 432).

Wreck and ferry.

CONVEYANCE UNDER A POWER OF SALE.

to the said manor, lands, hereditaments, and premises belonging, or anywise appertaining, or with the same or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any of them, or appurtenant thereto, with their and every of their appurtenances; AND the yearly, and other rents, issues, and profits, of all and singular the said manor, hereditaments, and premises hereby appointed, or intended so to be (*n*), shall henceforth go, remain, and be to the uses, &c. [*common uses to bar dower in favour of E. F., with a declaration to preclude a future wife from dower. See Precedent XVII.*]; AND he the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns (*o*), that he the said A. B. hath not, at any time heretofore, made, done, committed, or executed, or knowingly or willingly suffered or been party or privy to any act, deed, matter, or thing, whereby, or by reason or means whereof, he is in anywise hindered or prevented from making such sale as hereinbefore is mentioned, or from exercising the power of revocation and appointment hereinbefore by him exercised or intended so to be in manner aforesaid, according to the true intent and meaning of these presents (*p*); AND the said C. D. doth

And the reversion, &c.

To uses to bar dower.

Covenant by the trustee that he has not precluded himself from exercising his power.

Covenants by the tenant for life.

(*n*) The estate clause is not used in appointments, because the appointor does not appoint his own estate, but the estate which was made subject to his power, by the instrument creating the power.

Covenants will not run with the land.

(*o*) When the conveyance is by appointment, as here and in Precedent XVII., the covenants for title will not run with the land, because the appointees take under the instrument by which the power was created; and, consequently, there is no privity of estate between the covenantor and the covenantees. (See ante, Vol. i. Art. Covenants; 2 Sugd. V. & P. ch. xiii. s. 1). Where there is a releasee, the covenants should always be entered into with him and his heirs, as they will then run with the land, for the benefit of all the persons in whom the statute executes a use, declared on the seisin of the releasee. See the authorities above cited.

Covenants by trustees

(*p*) It is the well-settled practice of conveyancers, that a trustee never enters into any covenant, except a covenant that he has not

CONVEYANCE UNDER A POWER OF SALE.

hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns, in manner following; (that is to say), that for and notwithstanding any act, deed, matter, or thing, by him the said C. D., or any of his ancestors, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, the power or authority hereinbefore exercised by the said A. B., or intended so to be, was well and effectually created; and the same at the sealing and delivery of these presents is in full force, and in no wise suspended, extinguished, weakened, or become void; AND THAT, for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he the said C. D., now hath in himself full power to make such request, and give such direction as aforesaid; and the said A. B. now hath in himself good right, full power, and lawful and absolute authority to limit, declare, and appoint the said hereditaments and premises hereinbefore appointed or expressed, and intended so to be, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; AND THAT the said hereditaments and premises hereinbefore appointed or expressed, and intended so to be, shall from time to time, and at all times hereafter, go, remain, and be to the uses upon the trusts, and with, under, and subject to the power hereinbefore limited, declared, and contained of and concerning the same, and be peaceably and quietly entered into and upon, and be held possessed, occupied, and enjoyed, and the rents,

That the trustee's power was well created,

—and is in force,

—and that he, the tenant for life, has power to consent,

—and the trustee to appoint;

—for quiet enjoyment;

done any act which prevents his exercising his power, or releasing, as the case may be; or any act, whereby the estate may be incumbered. If the estate is in him, the covenant is generally simply that he has done no act whereby the estate may be incumbered, without reference to his right to convey. And, certainly, it is very reasonable that a trustee's covenants should be strictly confined to his own acts and those of persons claiming through him; but there seems no reason at all why he should not covenant in the usual way for further assurance by himself, and persons claiming through him. However, the established practice is, that a trustee does not covenant for further assurance, and it is in vain to attempt to alter the rule.

—do not extend to further assurance.

The above observations apply to the covenants of mortgagees, assignees, and others in similar situations.

CONVEYANCE UNDER A POWER OF SALE.

issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by them the said A. B. and C. D., or either of them, their or either of their heirs, or of or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for them or any of them, or by, from, or under any of the ancestors of the said C. D.; AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged, or otherwise, by him the said C. D., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B. and C. D., or either of them, their or either of their heirs, or by any other person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them or any of them, or any of the ancestors of the said C. D.; AND FURTHER THAT they the said A. B. and C. D., and each of them and each of their heirs, and all and every other person or persons, having or claiming, or who shall or may have or claim any estate, right, title, interest, use, trust, property, power, authority, claim, or demand whatsoever, either at law or in equity of, in, to, out of or over the said hereditaments and premises hereinbefore appointed or expressed, and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for them the said A. B. and C. D., or either of them, their or either of their heirs, or by, from, or under any of the ancestors of the said C. D., shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose by and at the proper costs and charges in the law of the said E. F., his heirs, appointees, or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, things, devices, appointments, conveyances, and

—free from incumbrances;

—for further assurance.

assurances, in the law whatsoever, for the further, better, more perfectly, and absolutely appointing, conveying, and assuring of the said hereditaments and premises hereinbefore appointed, or expressed and intended so to be, and every part thereof, to the uses and in manner aforesaid, as by the said E. F. and his heirs, appointees, or assigns, or his or their counsel in the law shall be reasonably advised or devised, and required. IN WITNESS &c.

CONVEYANCE UNDER A POWER OF SALE.

XXII.

CONVEYANCE *in pursuance of a* SALE *under a* DECREE *of the* COURT *of* CHANCERY *in a* CREDITOR'S SUIT (*a*) *of a* FREEHOLD MESSUAGE *from the* DEVISEE *in* TRUST *and* HEIR *at* LAW *of a Testatrix.*

CONVEYANCE UNDER A SALE IN CHANCERY.

THIS INDENTURE made &c., BETWEEN A. B., of &c. (the nephew and heir at law of A. A., late of &c., spinster, deceased), of the first part; C. D., of &c. (a devisee under the last will and testament of the said A. A.), of the second part; E. F., of &c. [*purchaser*], of the third part; and G. H., of &c. [*trustee*], of the fourth part: WHEREAS the said A. A., being seised or entitled for an estate of inheritance in fee-simple in possession, of or to the messuage and hereditaments hereinafter particularly mentioned and intended to be hereby released, duly made, signed, and published her last will and testament in writing, bearing date the — day of ——, and thereby gave, devised, and bequeathed all her freehold, copyhold, leasehold,

Parties.

Recital of will of testatrix.

(*a*) The law relating to sales under the authority of the courts of equity, is fully treated of in Sugd. V. & P. Ch. 11; and references to the recent orders and decisions, will be found in the first volume of this work.

CONVEYANCE UNDER A SALE IN CHANCERY.

and personal property of every description, situate, lying, and being in the city of —— and elsewhere, that she might be possessed of at the time of her death, both in possession, reversion, and expectancy to her friend the said C. D., in trust for F. L. C., the son of R. C., his heirs and assigns, in case he attained the age of twenty-one years, but if he died before attaining twenty-one, then upon trust for, and she gave all her said estate to J. D., daughter of the said C. D., her heirs and assigns for ever, and in case said F. L. C. attained twenty-one years, then he was to raise and pay out of her said estates, the sum of £500 to the said J. D., her heirs and assigns, and the said testatrix directed all her just debts to be paid: AND WHEREAS the said A. A. died on or about the — day of ——, without having revoked or altered her said will, leaving the said A. B., her nephew, her heir at law: AND WHEREAS the said F. L. C. and J. D. are both now infants: AND WHEREAS (*b*) by a decree or decretal order (*c*), made on the

—of death of testatrix, leaving A. B. heir-at-law;

—of beneficial devisees being infants;

—of a decree of the Court of Chancery for sale of the tes-

(*b*) It is usual to recite Chancery proceedings in the form in the text, chiefly because the conveyancer is very seldom furnished with a brief of the bill. But the more formal and regular method of recital, is to state that the plaintiffs filed their bill against the defendants, praying that, &c. (*setting forth the material part of the prayer*), that the several defendants appeared and put in their answer, and that by a decree made &c., it was declared &c. The form in the text departs from the correct order, because it states the decree before the name of the suit in which the decree was made; but it is more concise than the strictly regular recital, and is not, in ordinary cases, attended with any serious inconvenience. In the recital in the text, all the parties to the suit are mentioned; but when they are numerous, it is usual to recite that the decree was made in a cause "in which the said —— and all other persons interested or entitled under the said will, were plaintiffs, and the said —— were defendants," or to employ some similar form of recital. The essential point is to shew, either by mentioning the names, or by stating the fact, that all necessary persons were parties to the suit; because the equity of those who are not parties, is not bound by the decree. It does not appear in the precedent, why the Attorney-General was a defendant.

Recitals of Chancery proceedings.

(*c*) The books of Chancery practice do not appear to lay down distinctly the difference between a decree, and a decretal order. But it

CONVEYANCE UNDER A SALE IN CHANCERY.

— day of ——, in a cause in the High Court of Chancery, in which A. M., on behalf of herself and all other the creditors of the said A. A., was plaintiff, and the said C. D., the said F. L. C., by the said R. C. his guardian, the said J. D., by F. B. her guardian, and his Majesty's Attorney-General, were defendants; it was declared that the said will of the said A. A., was well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, and the said court did order and decree the same accordingly, and it was thereby also declared, that the real estate of the said testatrix was liable to make good the deficiency of her personal estate, to pay and satisfy her debts, and it was thereby ordered that the real estate of the said testatrix should be sold with the approbation of Master ——, one of the masters of the said court, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said master, wherein all parties were to join as the said master should direct; and it was thereby also ordered, that the money to arise by the said sale, should be paid into the bank with the privity of the accountant-general of the said court, to be there placed to the credit of the said cause: AND WHEREAS, in pursuance of the said decree or decretal order, the said messuage and hereditaments hereinafter particularly mentioned and intended to be hereby released, and also several other hereditaments were, with the approbation of the said master, put up to sale by public auction, on the — day of —— last, in three lots, by a particular of sale, (the first lot comprising the said messuage and other hereditaments hereinafter particularly mentioned and intended to be hereby released), and at the said sale, the

—tatrix's real estate, for payment of her debts;

—of sale by auction;

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would seem that a decretal order is a preliminary direction, made with a view to inquiry, and either at, or before, or after the hearing; sometimes such an order is termed interlocutory, although strictly all decrees are interlocutory until signed and inrolled. A decree simply, is the determination of the rights of the parties, and is made either at the hearing, or on further directions. (See 12 Ves. 315). This explanation is less ample than might be desired, but the meaning of the terms is not very material for conveyancing purposes.

Distinction between a decree and a decretal order.

CONVEYANCE UNDER A SALE IN CHANCERY.

said E. F. was declared the best bidder for and purchaser of the said messuage and hereditaments comprised in the said first lot, at or for the price or sum of £——, and the said Master Jekyll reported the same to the said court by a report bearing date the — day of —— last: AND WHEREAS by an order of the said court made in the said cause on the — day of —— last, the said report was confirmed nisi, and the said order by an order of the said court, made on the — day of —— last, was made absolute: AND WHEREAS in obedience to the said decree or decretal order, the said E. F. did, on the — day of —— last, with the privity of the said accountant-general of the said court, pay the said sum of £——, into the bank of England, to the credit of the said cause, [as appears by a receipt of one of the cashiers of the bank of England, and a certificate of the said accountant-general, dated respectively the —— and —— days of ——](*d*): AND WHEREAS by an order of the said court, made in the said cause on the —— day of —— last, it was ordered that, &c. (*e*):

—of the Master's report of the sale;

—of confirmation of the report;

—of payment of the purchase-money into the Bank;

—of order for the infant, ultimately becoming entitled to convey, on attaining twenty-one.

(*d*) The words in brackets are not needed, as it is of no consequence for the purpose of conveyance, by what evidence the payment is proved.

Conveyance by infant heirs and devisees, when an estate is sold for payment of debts.

(*e*) The recitals in this draft, were settled by an eminent conveyancer, in consultation with an equity draftsman of high reputation. It was suggested in a note, that an order should be obtained for F. L. C. to convey, in case of his attaining twenty-one, and for J. D. or her heirs, to convey if F. L. C. died under that age. The commencement of the recital of the intended order, is given in the text, and it may be observed, that the material parts of orders of courts of equity, should be stated literally.

Since the precedent in the text was settled, it has been enacted by the statute 11 Geo. 4 & 1 Will. 4, c. 47, sect. 11, that if in any suit in any court of equity for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof could not, as the law stood before the statute, be compelled, in every such case such court shall direct and, if necessary, compel such infant or infants to convey such estates so to be sold, (by all proper assurances

CONVEYANCE UNDER A SALE IN CHANCERY.

NOW THIS INDENTURE WITNESSETH, that in obedience to the said decree or decretal order in this behalf, and for conveying such estate or interest as may be vested in the said A. B. and C. D., or either of them, of or in the said messuage and hereditaments hereinafter particularly mentioned and intended to be hereby released with the appurtenances, to the uses upon the trusts, and under and subject to the power hereinafter limited and declared of or concerning the same, and in consideration of the said sum of £—— so paid by the said E. F. into the bank of England as aforesaid, he the said A. B., according to his estate and interest (if any) as heir-at-law of the said A. A., of or in the said messuage and hereditaments hereinafter particularly mentioned, and intended to be hereby released, and the said C. D., according to his estate and interest (if any) as devisee under

Witnesseth.

Conveyance by the heir-at-law and devisee, in trust.

Consideration.

Operative words.

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in the law), to the purchaser or purchasers thereof, and such conveyances are to be effectual accordingly.

It has been decided that the statute extends to the heir of a devisee; (*Brook* v. *Smith*, 2 Russ. & My. 73); and that an infant tenant in tail may be ordered to convey by an inrolled deed, in pursuance of the statute 3 & 4 Will. 4, c. 74. (*Radcliffe* v. *Eccles*, 1 Keen, 130; see, too, *Price* v. *Carver*, 3 My. & Cra. 157; *Anon.*, 1 You. & Col. 75).

By the 12th section of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, persons having a life or other limited interest, may convey the fee, if the estate is to be sold under a decree for payment of debts.

Settlement of draft by Master in Chancery.

It is usual so to word decrees, that the draft shall not be settled by the master, unless the parties differ. (1 Sugd. V. & P. 63; Seton on Decrees, 27). When this mode is adopted, the business (if the parties agree), is transacted in the same way as upon a sale by private contract, and of such nature appears to be the conveyance in the text. If the master's approval of the drafts is required or taken, the following recital should be introduced:—

"And whereas the said master —— hath settled and approved of these presents, and the indenture of lease for a year, on which the same is grounded, as proper conveyances and assurances of the said ——, and other hereditaments hereinafter particularly mentioned, and intended to be hereby released, and hath testified such approval by signing his name in the margin of the same indentures."

The master usually signs every skin. (1 Sugd. V. & P. 63).

CONVEYANCE UNDER A SALE IN CHANCERY.

the said will, of or in the same messuage and hereditaments, have and each of them hath released, and by these presents, do and each of them doth release unto the said E. F., (in his actual possession now being by virtue of a bargain and sale thereof to him made by the said A. B. and C. D. in consideration of five shillings a piece &c. [*See Precedent XVI.*], and his heirs, ALL THAT messuage (*f*) &c. [*parcels*], together with all outhouses, edifices, buildings, cellars, sollars (*g*), areas, courts, court-yards, warehouses, pumps, cisterns, privies, sewers, gutters, drains, wydraught (*h*), backsides, ways, paths, passages, lights (*i*), easements,

Parcels.

General words for houses in towns.

Description of houses in towns.

(*f*) Houses in towns should be described, not only by reference to the number of the street, but also by reference to a map or plan drawn in the margin of or annexed to the conveyance. The number alone does not sufficiently define the limits of the property. It is frequently accompanied by the measurements, but a plan with the measurements marked on it, affords by far the best description. It may be observed, that in nearly all conveyances, a plan is desirable, and if there be one in existence, a copy of it should be drawn on or annexed to, and referred to in the deed. It is most usual to describe property in the body of the deed, but whenever it consists of many pieces of land, the clearest description is made by a schedule and plan. The schedule describes each piece by its name, tenancy, and number in the plan, and gives the quantity of land it contains. Houses and small properties are most conveniently described in the body of the deed.

Description of property by maps and schedule.

(*g*) A sollar is an upper room or garret. (See Jac. Law Dic. *Solarium*).

(*h*) A wydraught is a watter-passage, gutter, or watering-place. (Jac. Law. Dict.).

The right to light.

(*i*) Before the stat. 2 & 3 Will. 4, c. 71, the right to light was acquired by an uninterrupted enjoyment for twenty years, if the owners of the property, who could have obstructed the light, had a sufficient estate in their property to bind it by their acquiescence. (*Cross* v. *Lewis*, 2 B. & C. 686; *Moore* v. *Rawson*, 3 B. & C. 332; except in the city of London, *Wynstanley* v. *Lee*, 2 Swanst. 333). And, now, by the above stat. s. 3, when the access and use of light to and for any building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary, notwithstanding, unless it shall appear that

CONVEYANCE UNDER A SALE IN CHANCERY.

waters, watercourses, liberties, privileges, profits, commodities, advantages, and emoluments whatsoever to the said messuage or hereditaments and premises hereby released, or intended so to be, or any of them belonging, or in anywise appertaining, or with the same, or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any of them, or any part of them, or appurtenant thereto, with their and every of their appurtenances; AND THE REVERSION and reversions, remainder and remainders yearly, and other rents, issues, and profits of all and singular the said messuage, hereditaments, and premises hereby released or expressed, and intended so to be; AND ALL THE ESTATE, right, title, interest, inheritance, use, trust, possession, property, claim, and demand whatsoever, both at law and in equity, of them the said A. B. and C. D. respectively of, in, and to the same premises, and every part and parcel thereof: To HAVE and To HOLD the said messuage and hereditaments, and all and singular other the premises hereby released or expressed, and intended so to be, unto the said E. F. and his heirs, to such uses &c.; [*common uses to bar dower with a declaration as in Precedent XVII.*]; AND each of them the said A. B. and C. D., so far as relates to his own acts and deeds only, doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F. and his heirs, that they the said A. B. and C. D. respectively (*k*) have not at any time heretofore made,

And the reversion, &c.

And all the estate, &c.

Habendum.

To uses to bar dower.

Covenants by the heir-at-law and devisee, severally, against incumbrances.

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the same was enjoyed by some express consent or agreement in writing. (See, too, *Garritt* v. *Sharp*, 3 Ad. & Ell. 325).

(*k*) The form of covenant for two or more trustees against their own incumbrances varies a good deal, but that in the text is the one most generally approved. It appears to express sufficiently the real intention, viz. that each trustee means to covenant that *he* has not done any act to incumber the estate, but that he does not mean to make himself liable for the acts of his co-trustee. It is not uncommon to add, after the words "so far as relates to his own acts and deeds

Trustees' covenants against incumbrances.

CONVEYANCE UNDER A SALE IN CHANCERY.

done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whereby, or by reason or means whereof, the said hereditaments and premises hereinbefore released or expressed, and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. IN WITNESS &c.

XXIII.

CONVEYANCE ON PURCHASE UNDER A DECREE.

CONVEYANCE *on a* PURCHASE *under a* DECREE *of the* COURT *of* CHANCERY.

Parties. Recitals. THIS INDENTURE, &c., [*parties—usual recitals shewing the vendors' interests in the estate purchased—also recitals of a will directing money to be laid out in purchase of land, and of the institution of a suit for carrying into effect the trusts of the will, and of an agreement by the trustees of the will for purchase of an estate* (*a*)]: AND

Recital of re-

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only," the words "but not further or otherwise;" the addition, however, adds no meaning which was not expressed before.

When an estate is sold for payment of debts under a decree of a court of equity, the purchaser gets no covenants for title—except the covenants against incumbrances by the parties conveying. (See 1 Sugd. V. & P. 536, 537).

Recitals on purchases by trustees.

(*a*) In conveyances in which the purchasers are trustees, there are two distinct sets of narrative recitals: one which shews the creation and existing condition of the trust; the other the usual set explaining the estate of the vendor. If he be seised in fee, of course the latter set is not required. The mode of arranging these recitals will be found in Precedent XXIX. p. 290, infra. The two sets of recitals are kept quite distinct, but it is not material which is placed first. Sometimes, the recitals relating to the vendor's title have the precedence, and sometimes the point is determined by the date of the

CONVEYANCE ON PURCHASE UNDER A DECREE.

WHEREAS, by an order of the said Court, bearing date the —— day of ——, after stating the said agreement, and that there was then standing in the name of the said accountant-general in trust in the said cause, "the account of the clear residue of the said testator's estate," the stocks or funds therein mentioned, including the sum of £6,700 *3l.* per cent. reduced bank annuities, it was ordered that it should be referred to Master ——, to whom the said cause stood referred, to inquire whether the said freehold estate and premises, situate in the parish of ——, in the county of ——, the property of the said [*vendors*], was a proper estate and of sufficient value to be purchased out of the said trust funds in the said cause, upon the trusts of the will of the said [*testator*], at the price of £1,700; and if the said master should find the said estate and premises to be a proper purchase, and of sufficient value to be purchased out of the said trust funds at the price aforesaid, then that he should inquire whether a good title could be made thereto, and should state the result of the said inquiries, with his opinion thereon, to the said Court: AND WHEREAS the said master, by his report, bearing date the —— day of ——, and made in pursuance of the said order, certified, that, upon making the said inquiries and upon considering the affidavit of A. B., of &c., land-surveyor, who had then lately surveyed and valued the same estate at —— aforesaid, he was of opinion, that the said estate was a proper estate and of sufficient value to be purchased out of the said trust funds, upon the trusts of the will of the said [*testator*], at the price of £1,700, and that abstracts of the title to the said estate having been laid before him (the said master), he had perused and considered the same, and was of opinion that a good title could be made thereto: AND WHEREAS, by another order made in the said cause, bearing date the —— day of —— now last past, it was ordered, that the

—reference to the master respecting the purchase;

—of master's report, approving purchase;

—of order, confirming report and directing sale of stock, to raise purchase-money;

first instrument of each set—the earliest being placed first. But when the transaction is considered as a purchase by the trustees, and not a sale by the vendors, (see ante, page 193, note (*c*)), perhaps, the proper way is to take first the recitals relating to the trust, and then those which deal with the vendors' title.

CONVEYANCE ON PURCHASE UNDER A DECREE.

said master's report should be confirmed, and that the said accountant-general should sell so much of the said sum of £6,700 3*l.* per cent. reduced bank annuities standing in the name of the said accountant-general in trust in the said cause, " the account of the clear residue of the said testator's estate," as would be sufficient to raise the sum of £1,725, (being the said sum of £1,700, the amount of the purchase-money for the said estate, and £25 the ad valorem duty on the said purchase), and that the said sum of £25, part of the said sum of £1,725, should be paid to Mr. C. D., clerk to the said master, to discharge the said ad valorem duty, and that it should be referred to the said master to settle proper deeds, conveyances, and assurances for conveying and assuring the said freehold estate and premises unto and to the use of the said [*trustees of the will*], or of the trustees for the time being of the will of the said [*testator*], upon the trusts by the said will declared concerning the estates thereby directed to be purchased, and that upon the execution of the said deeds, conveyances, and assurances by all necessary parties as the said master should direct, (such execution to be certified by him), the sum of £1,700 residue of the said sum of £1,725 so to be raised as aforesaid, should be paid to the several persons, and in the proportions following; (that is to say), the sum of &c. [*recites the master's approval of deeds, see ante, page 239*]: NOW THIS INDENTURE WITNESSETH, that in pursuance of and obedience to the said order of the —— day of —— now last past, and in consideration of the sum of £1,700 to be paid in pursuance of the same order to the said several persons, and in the proportions aforesaid, in full for the purchase of the said pieces of land and hereditaments hereinafter mentioned, and intended to be hereby appointed and released; He the said [*first conveying party*] hath &c. (*b*).

—and referring it to master to settle conveyances.

Witnesseth.

(*b*) It has been deemed right (in order to avoid too great an extension of the work) to give merely such parts as are peculiar of the Precedent in the text. The operative parts, habendum, and covenants, do not differ from the forms in other conveyances. The purchaser should preserve evidence of the payment of the purchase-money,

XXIV.

CONVEYANCE *by a* MORTGAGEE, *under a* POWER *of* SALE, *without the Concurrence of the Mortgagor* (*a*).

CONVEYANCE BY MORTGAGEE, WITH POWER OF SALE.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagee and vendor*], of the first part; C. D., of &c., [*agent for the purchaser*], of the second part; and E. F., of &c., widow, [*purchaser*], of the third part: WHEREAS, by an indenture of release, bearing date the —— day of ——, grounded on a lease for a year, and made, or expressed to be made between J. B. and J. W., of the first part; W. T., of the second part; and the said A. B., of the

Parties.

Recites mortgage deed.

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either by procuring the receipts of the vendors to be indorsed on the deed in the usual way, or by obtaining office copies of the documents which shew that the money was actually paid.

(*a*) Great doubt seems formerly to have been entertained whether a mortgage, with a power or trust for sale in default of payment, was valid, so that the mortgagee could make a perfect title to the purchaser, without the concurrence of the mortgagor. (See Coote on Mortgages, ch. v. first edition; 1 Sugd. V. & P. 357). But it is now well established, that a sale made by a mortgagee, under a power or trust for sale, contained in the mortgage deed, is perfectly valid, and that the purchaser, on taking a conveyance from the mortgagee, will hold the estate freed from the equity of redemption of the mortgagor. (*Clay* v. *Sharp*, 2 Sugd. V. & P. No. xv; *Corder* v. *Morgan*, 18 Ves. 344; 1 Sugd. V. & P. 358). And a clause in the mortgage deed, that the mortgagor shall, *if required*, be a party to the conveyance, does not render his consent *necessary*. (*Corder* v. *Morgan*, ubi supra).

Validity of power of sale in mortgage.

If, however, the mortgagor is willing to concur, he should always be made a party, as well for removing all doubts as to whether the power of sale is effective and duly exercised, as for obtaining the usual covenants for title. The mortgagee, of course, only covenants that he has not incumbered the estate.

Mortgagor's concurrence desirable.

CONVEYANCE BY MORTGAGEE, WITH POWER OF SALE.

third part; after divers recitals, whereby (amongst other things) it appeared, that there was then due by the said W. T. to the said J. B. and J. W., the sum of £—— (*b*): IT WAS WITNESSED, that in consideration of the sum of £——, paid by the said A. B., by the direction of the said W. T. to the said J. B. and J. W., and for a nominal consideration, the said J. B. and J. W. did release, and the said W. T. did grant, release, and confirm, and also, by virtue of every power and authority enabling him in that behalf, direct, limit, and appoint unto the said A. B., his heirs and assigns, the hereditaments therein mentioned, (including the hereditaments hereinafter particularly mentioned and intended to be hereby released), to hold the same unto and to the use of the said A. B., his heirs and assigns for ever, subject to the proviso thereinafter contained for redemption of the same premises, on payment by the said W. T., his heirs, executors, administrators, or assigns, to the said A. B., his executors, administrators, or assigns, of the sum of £——, with interest for the same, after the rate of 5*l.* per cent. per annum, on the —— day of —— then next ensuing: AND it was by the said indenture declared, that in case default should happen to be made in payment of the said sum of £——, or the interest thereof, or any part of the same respectively, at the time and in the manner mentioned in the proviso lastly thereinbefore contained for payment thereof, contrary to the true intent and meaning of the said indenture, then it should be lawful for the said A. B., his heirs, executors, administrators, or assigns: [*recites, verbatim, the power of sale, with the power for the mortgagee to give receipts, and the clauses*

—with power of sale.

Recital of transfer of mortgage.

(*b*) The instrument recited in the text is a transfer of a mortgage. It is not essential to commence the recitals with the original mortgage, because the statements, that the debt was due from W. T. to J. B. and J. W., and that it was paid off by A. B., by direction of W. T., and that J. B. and J. W. conveyed, by the direction of W. T., coupled with the proviso for redemption, sufficiently shew that the equity of redemption belonged to W. T. As the sale is made by a mortgagee under a power, and the mortgagor does not join in the conveyance, it is needless to shew what has become of the equity of redemption, since the date of the mortgage.

CONVEYANCE BY MORTGAGEE, WITH POWER OF SALE.

exonerating the purchaser from seeing to the propriety of the sale] (*c*): AND WHEREAS, default having been made in payment of the said sum of £—— (*d*), at the time in the said indenture appointed for payment thereof, the said A. B., pursuant to the said power of sale given to him, as hereinbefore is mentioned, caused the said hereditaments hereinafter particularly mentioned and intended to be hereby released, together with other hereditaments included in the said indenture of the —— day of ——, to be put up for sale, by public auction, on the —— day of ——, by a particular of sale, in four lots, the fourth lot comprising the said hereditaments intended to be hereby released: AND WHEREAS, at the said sale, the said C. D. was the highest bidder for, and was declared the purchaser of, the said hereditaments, comprised in the said fourth lot, for the price or sum of £2,000, and immediately after the said sale paid the sum of £400 to or on accouut of the said A. B., by way of deposit, and in part payment of the said sum of £2,000: AND WHEREAS the said purchase was made by the said C. D., as agent for the said E. F., and the said sum of £400, so paid by way of deposit as aforesaid, was money belonging to the said E. F.: NOW THIS

Recites sale by auction, in pursuance of power;

—purchase at the auction;

—that purchase was made by an agent.

Witnesseth.

(*c*) The purchaser's counsel will have satisfied himself, before he comes to draw the conveyance, that the power of sale is effective. The mortgagee takes the legal estate by the mortgage, and, of course, can convey it to the purchaser; the question is as to defeating the equity of the mortgagor. For this purpose, it is chiefly essential to see that the mortgagee's receipt is made a valid discharge to purchasers, and that the purchasers are absolutely exempted from the necessity of ascertaining that money is due on the mortgage—that the required forms of sale (if any) have been complied with,—and that the sale is regular in every respect. All the clauses which protect the purchaser, and enable the power of sale to be effectuated, should be set forth literally.

Manner of reciting the power of sale in a mortgage.

(*d*) As the power of sale (when effective) frees the purchaser from the necessity of ascertaining whether default has been made in payment of the mortgage money, perhaps it is not right to recite that default has been made in payment. It is, however, usual to do so, and consequently the form has been suffered to remain.

CONVEYANCE BY MORTGAGEE, WITH POWER OF SALE.

INDENTURE WITNESSETH, that, for effectuating the said sale, and in consideration of the said sum of £400 so paid by the said C. D. for and on behalf of the said E. F., by way of deposit, as hereinbefore is mentioned; and also in consideration of the sum of £1,600 at or immediately before the sealing and delivery of these presents, to the said A. B. paid by the said E. F., (the receipt of which said sums of £400 and £1,600, making together the said purchase-money, or sum of £2,000, he the said A. B. doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said E. F., and also the said C. D., their and each of their heirs, executors, administrators, and assigns for ever, by these presents), and pursuant to (*e*) and in exercise and execution of the said power to him the said A. B. for this purpose given by the said indenture of the 21st day of March, 1835, as hereinbefore is mentioned, and of all other power or authorities in anywise enabling him in this behalf, he the said A. B., with the privity and consent of the said C. D., (testified by his being a party to and executing these presents), hath released, and by these presents doth release unto the said E. F., (in her actual possession, now being by virtue of a bargain and sale thereof to her made by the said A. B., in consideration of &c., [see Precedent XVI.]), and his heirs, ALL THAT, &c., [*parcels, general words*]: TO HAVE AND TO HOLD the said and hereditaments, and all and singular other the premises hereby released, or expressed and intended so to be, unto the said E. F. and her heirs, (freed and discharged of and from the said principal sum of £——, and every part there-

Consideration.

Receipt.

Reference to power.

Operative words.

Habendum.

(*e*) The words "by force and virtue," which are generally employed in referring to a proper power, (see ante, Precedents XVII. and XXI.), seem to be correctly omitted in this place. For the mortgagee conveys his estate by virtue of his legal interest, and does not appoint it under a power to declare new uses of it; and although it is by virtue of the power that the estate is discharged from the equity redemption, the difference in the mode of reference seems to be appropriate.

CONVEYANCE BY MORTGAGEE, WITH POWER OF SALE.

of, and all interest now due, or to grow due for the same or any part thereof), to the use of the said E. F., her heirs and assigns for ever (*f*): AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., her heirs and assigns, that he the said A. B., hath not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof [he is in anywise hindered or prevented from releasing] the said hereditaments and premises hereinbefore released or expressed and intended so to be, [unto and to the use of the said E. F., her heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents, or whereby or by reason or means whereof (*g*), the said hereditaments and premises], or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. IN WITNESS &c.

Covenant by vendor, that he is not prevented from releasing;

—against incumbrances.

(*f*) In conveyances to femes sole, it has been usual to limit the estate to them in fee. But before the statute 1 & 2 Vict. c. 110, it would have been more correct to have given them a power of appointment, in order to overreach any judgments recovered against them. Even now, in some cases, the power would be useful; (see ante, Precedent XVII., p. 205, note (*a*)). The limitation in default of appointment, would be to the purchaser in fee.

(*g*) The words in brackets are not always used. (See ante, Precedent XXI., note (*n*)). They are not of very much moment, for the subsequent words of the covenant are probably sufficiently general to include the meaning of those within the brackets. If this covenant is used when the conveyance is not in fee, for "unto and to the use of the said E. F., her heirs and assigns," should be substituted, "to the uses and."

XXV.

CONVEYANCE BY MORTGAGEE AND TRUSTEE, FOR SALE.

CONVEYANCE *by a* MORTGAGEE *and a* TRUSTEE *for* SALE *of the Equity of Redemption; the* MORTGAGE *being* KEPT ON FOOT *for the Benefit of the Purchaser* (*a*).

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagee*], of the first part; C. D., of &c., [*trustee for sale*], of the second part; E. F., of &c., [*purchaser*], of the third part; and G. H., of &c., [*trustee for the purchaser*], of the fourth part: WHEREAS, by an indenture of release, bearing date the — day of ——, grounded on a lease for a year, and made or expressed to be made between M. N.,

Recital of mortgage.

On keeping on foot incumbrances, for the benefit of a purchaser.

(*a*) If there be two or more mortgages on an estate, and the owner of the first mortgage, or of any of the first mortgages, purchases and takes a conveyance to himself of the equity of redemption, he cannot afterwards set up his mortgage against any of the subsequent incumbrances of which he had notice. (*Toulmin* v. *Steeve*, 3 Mer. 210; *Brown* v. *Stead*, 5 Sim. 535; see, too, *Smyth* v. *Phillips*, 1 Keen, 694). But it seems that if a purchaser actually keep on foot a prior mortgage to which he may be entitled, or any mortgages which he may pay off, he will be entitled to the benefit of them against subsequent incumbrancers. (*Parry* v. *Wright*, 1 Sim. & Stu. 369; S. C. 5 Russ. 142). The distinction, as Sir Edward Sugden observes, is a very subtle one, but being established, it becomes necessary for any purchaser who has reason to suspect the existence of incumbrances subsequent to any mortgages which he may pay off, to have these mortgages kept on foot for his protection. If he simply pays them off in the usual way, he loses the protection they afford.

Mortgages may be kept on foot in a variety of ways, but the manner in which the object is effected in the Precedent in the text is, perhaps, as good as any. The inconvenience is, that it leaves the legal estate outstanding in the trustee.

The legal estate might be limited to the purchaser in trust, in the first place, for securing the mortgage debt to the trustee, and subject thereto for the benefit of the purchaser himself.

CONVEYANCE BY MORTGAGEE AND TRUSTEE, FOR SALE.

of the one part, and the said A. B. of the other part, in consideration of the sum of £1,000 to the said M. N. paid by the said A. B., the said M. N. did grant and release unto the said C. D., his heirs and assigns, the messuages, lands, and other hereditaments hereinafter particularly mentioned and intended to be hereby released with their appurtenances: To hold the same unto and to the use of the said C. D., his heirs and assigns, subject, nevertheless, to the proviso or condition in the said indenture now in recital contained for redemption of the said premises, on payment by the said M. N., his heirs, executors, administrators, or assigns, to the said C. D., his executors, administrators, or assigns, of the sum of £1,000, on the day therein mentioned, together with interest for the same, after the rate, at the times, and in manner therein mentioned: [*recital of the conveyance of the equity of redemption to C. D., in trust for sale, with power to give receipts to purchasers*]: AND WHEREAS the said C. D. hath contracted and agreed with the said E. F. for the absolute sale to him of the messuages, lands, and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances and the inheritance thereof, in fee-simple in possession, free from incumbrances, at or for the price or sum of £1,500: AND WHEREAS the said principal sum of £1,000, together with the sum of £50 for interest on the same, making together the sum of £1,050, are now due and owing to the said A. B., on the security of the said indenture of the —— day of ——: AND WHEREAS it hath been agreed that the said sum of £1,050, so due and owing to the said A. B. as aforesaid, shall be paid to the said A. B. out of the said purchase-money or sum of £1,500, and that the said mortgage shall be kept on foot for the benefit of the said E. F., in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £1,050 to the said A. B., paid by the said E. F., at the request and by the direction of the said C. D., (testified by his being a party to and executing these presents), (the receipt of which said sum of

Of conveyance of equity of redemption, in trust for sale;

—of contract for sale;

—of the amount due on the mortgage;

—that mortgage is to be paid off, and kept on foot for benefit of purchaser.

Witnesseth.

Consideration.

Receipt by mortgagee.

CONVEYANCE BY MORTGAGEE AND TRUSTEE, FOR SALE.

£1,050, the said A. B. doth hereby acknowledge, and of and from the same and every part thereof, doth acquit, release, and discharge the said E. F., his heirs, executors, and administrators for ever, by these presents, and doth declare the same to be the full amount of the monies due or owing to him the said A. B., upon or by virtue of the said indenture of the —— day of ——), and in consideration of the further sum of £450, at the same time to the said C. D. paid by the said E. F., (the receipt and payment in manner aforesaid, of which said sums of £1,050 and £450, making together the said purchase-money or sum of £1,500, he the said C. D. doth hereby acknowledge, and of and from the same and every part thereof, doth acquit, release, and discharge the said E. F., his heirs, executors, and administrators for ever, by these presents, and doth declare the same to be in full for the purchase of the said messuage, lands, and other hereditaments), he the said A. B., at the request and by the direction of the said C. D., and on the nomination and appointment of the said E. F., (testified by their severally being parties to and executing these presents), hath assigned, and by these presents doth assign unto the said G. H., his executors, administrators, and assigns, ALL THAT the said principal sum of £1,000 due and owing to the said A. B., on the security of the said indenture of the —— day of ——, as hereinbefore is mentioned, and all interest now due or henceforth to become due for the same, and the full benefit of the covenant contained in the said indenture of the —— day of ——, for securing the same, and of all other securities for the same: AND ALL THE ESTATE, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said A. B. of, in, to, out of, or upon the same premises, and every part thereof, TOGETHER with full power and authority for the said G. H., his executors, administrators, and assigns, or any of them, to ask, demand, sue for, recover, and receive and give effectual receipts and discharges for the said principal money and interest in the name or names of the said A. B., his exe-

Further consideration.

Receipt by trustee.

Assignment of mortgage debt to trustee.

Power of attorney.

cutors, or administrators (*b*): To HAVE, HOLD, RECEIVE, AND TAKE the said principal monies, and interest, and all and singular other the premises hereinbefore assigned or expressed, and intended so to be unto the said G. H., his executors, administrators, and assigns, upon the trusts hereinafter mentioned: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said G. H., his executors, administrators, and assigns, by these presents, that he the said A, B., hath not at any time heretofore made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof he the said A. B. is in anywise prevented or hindered from assigning the said premises hereinbefore assigned, or expressed and intended so to be, in manner aforesaid, according to the true intent and meaning of these presents, or whereby or by reason or means whereof the said premises, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever: AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B., at such request, and by such direction and upon such nomination as aforesaid, (testified as aforesaid), hath released, and by these presents doth release, and he the said C. D. hath released, and by these presents doth release unto the said E. F., (in his actual possession now being, by virtue of a bargain and sale thereof, to him made by the said A. B. and C. D., in consideration of five shillings a-piece, &c., see Precedent XVI.) and his heirs, ALL, &c. [*parcels—general words*]; TO HAVE AND TO HOLD the said messuages, lands, and hereditaments, and all and singular other the premises hereby released, or expressed, and intended so to be, unto the said E. F., and his heirs, TO THE USE of the said G. H., his heirs, and assigns,

CONVEYANCE BY MORTGAGEE AND TRUSTEE, FOR SALE.

Habendum, in trust.

Covenant by mortgagee for right to assign, free from incumbrances.

Further witnesseth.

Conveyance of the freehold.

Habendum.

To use of trustee, for securing mortgage debt.

(*b*) A much longer form of power of attorney is often used, but as the short form in the text is undoubtedly effectual, it is entitled to the preference. The long forms may be seen ante, Vol. II., p. 385.

CONVEYANCE BY MORTGAGEE AND TRUSTEE, FOR SALE.

for better securing to him the said G. H., his executors, administrators, and assigns, the said principal money and interest, hereinbefore assigned or expressed, and intended so to be, and subject and without prejudice to the raising and payment of the said principal money and interest, in trust for the said E. F., his heirs and assigns, and to be conveyed and disposed of by the said G. H., his heirs and assigns, as the said E. F., his heirs and assigns shall, from time to time, direct; AND THE SAID E. F. doth hereby declare, that if he shall die, leaving a widow, such widow shall not be entitled to her dower out of or in the said premises, or any part thereof: [*covenant by A. B. and C. D., against incumbrances, as in Precedent XXII., page* 241, (*c*)]; AND IT IS HEREBY agreed and declared between and by the parties to these presents, that the said G. H., his executors, administrators, and assigns, shall stand and be possessed of and interested in the said principal money and interest, and all and singular other the premises hereinbefore assigned or expressed, and intended so to be, upon trust, to assign and dispose of the same as the said E. F., his heirs and assigns, shall, from time to time, direct; in the meantime to permit and suffer the said premises to wait upon and attend the reversion, freehold, and inheritance of the hereditaments and premises hereinbefore released or expressed, and intended so to be, and to protect the same from all mesne incumbrances, if any such there be. IN WITNESS &c.

—and subject thereto, in trust for purchaser.

Declaration to bar dower.

Covenant.

Declaration of trust of mortgage money.

(*c*) See, too, the form and note, page 249.

XXVI.

CONVEYANCE *by* MORTGAGOR *and* FIRST *and* SECOND MORTGAGEES *to Uses to bar Dower in favour of the* FIRST MORTGAGEE, *the Purchaser. A* THIRD MORTGAGEE *surrenders a* TERM *of Years, and a former Owner conveys some Property which had been omitted by mistake in a previous Conveyance.*

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*first mortgagee and purchaser*], of the first part; C. D., of &c., [*second mortgagee*], of the second part; E. F., of &c., [*mortgagee for a term*], of the third part; G. H., of &c., [*mortgagor and vendor*], of the fourth part; I. K., of &c., [*former owner*], of the fifth part; the said A. B., [*purchaser*], of the sixth part (*a*); and L. M., of &c., Parties.

(*a*) It is the practice of conveyancers to make a person party to the instrument more than once if he acts in more than one capacity; and according to the number of capacities in which he acts is the number of times he is made a party. Thus, in the present case, A. B. is made a party of the first part as the first mortgagee, and as having the legal estate, and is made a party of the sixth part as the purchaser. So, if he were a cestui que trust, and also one of the trustees, he would be made a party in both capacities, and if he were a trustee of a term of years, and also one of the parties beneficially interested in a mortgage debt, and also the owner of a reversion or remainder, he would be made a party in each of these capacities, and be placed in his proper rank among the parties.

Persons made parties more than once, if filling different characters.

This practice is not required by any rule of law, for it is sufficient to name each person once; but it is found convenient to mention each person in each capacity he fills, in order that any one, on looking at the parties, may be enabled to form some conjecture of the scope and purpose of the instrument. It is, with the same view, that it is very usual to add to each person's name in the parties, a brief statement of the character he fills. (See ante, page 3).

Both practices are, perhaps, of some use to the draftsman, by en-

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

Recital of conveyances;

[*dower trustee*], of the seventh part: [*recites conveyance by indentures of lease and release of the* 1*st and* 2*nd days of September*, 1817, *and a fine* " of the hereditaments secondly hereinafter particularly mentioned, and intended to be hereby released" *to common uses, to bar dower in favour of I. K.—and conveyance by indentures of lease and release of the* 17*th and* 18*th days of December*, 1827, " of the hereditaments firstly hereinafter particularly mentioned, and intended to be hereby released," *to common uses, to bar dower in favour of G. H.* (*b*)]: AND WHEREAS, by an indenture of appointment and release, bearing date the 20th day of March, 1828, grounded so far as the same operated as a release on a lease for a year, and made, or expressed to be made between the said G. H., of the one part, and J. B., of the other part, in consideration of the sum of £5,000 to the said G. H. paid by the said J. B., the said G. H. did, in pursuance of the said power to him given by the said indenture of the 18th day of December, 1827, direct, limit, and appoint, that the hereditaments thereinafter particularly mentioned, and intended to be thereby granted and released, should thenceforth go, remain, and be to the use of the said J. B., his heirs and assigns, subject to the proviso thereinafter contained and hereinafter mentioned for redemption of the same premises: AND by the said indenture now in recital, the said G. H. did grant and release unto the said J. B. and his heirs, the said hereditaments firstly hereinafter particularly mentioned, and intended to be hereby released, to hold the same unto and to the use of the said J. B., his heirs and assigns, subject to the proviso thereinafter contained for redemption of the same premises, on payment by the said G. H., his heirs, appointees, executors, administrators, or assigns, to the said J. B., his executors, administrators, or assigns,

—of first mortgage;

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abling him the better to determine whether he has put all the proper parties to his draft, and has arranged them in the proper order. But the characters of the parties are often inaccurately described, owing to the necessary brevity of the statement.

(*b*) See the form of this recital ante, Precedent XVII. pp. 209, 210.

of the sum of £5,000, on the day therein mentioned, with interest for the same, at 5*l.* per cent. per annum, on the days and in manner therein mentioned: [*recites a similar mortgage, dated the 26th of July, 1834, of the same hereditaments, and of other hereditaments by the said G. H. to the said C. D. for £400 and interest*]: AND WHEREAS, by an indenture bearing date the 30th day of April, 1835, and made or expressed to be made between the said G. H., of the one part, and the said E. F., of the other part, in consideration of the sum of £300 then due and owing by the said G. H. to the said E. F., the said G. H. did grant and demise unto the said E. F., his executors, administrators, and assigns, (together with other hereditaments), the said hereditaments firstly hereinafter particularly mentioned, and intended to be hereby released, to hold the same (subject to the said mortgage sums of £5,000 and £400, and the interest thereon respectively), unto the said E. F., his executors, administrators, and assigns, from thenceforth for the term of 1,000 years, without impeachment of waste, upon the trusts therein mentioned, for securing to the said E. F., his executors, administrators, and assigns, the payment of the said sum of £300 and interest, in manner therein mentioned, and subject thereto, upon trust for the said G. H., his executors, administrators, and assigns: AND WHEREAS the said J. B. duly made, signed, and published his last will and testament in writing, bearing date the 1st day of December, 1804, and thereby gave and bequeathed to his brother, the said A. B., all his personal estate and effects, and appointed the said A. B. sole executor thereof: AND WHEREAS the said J. B. died on the 6th day of May, 1837, without having republished (*c*), or revoked, or altered his

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

—of second mortgage;

—of third mortgage—for a term;

—of will of first mortgagor, bequeathing his personal estate to A. B., his executor;

—of his death, leaving A. B. heir-at-law;

(*c*) As the testator's will was made before the mortgage to him, and before the stat. 1 & 2 Vict. c. 26, the legal estate did not pass by the will, on the general principle, that before the above stat. a will did not operate on after-acquired lands. (*Bunker* v. *Cook*, 1 Salk. 237; S. C. D. P. 3 Bro. P. C. 19; Toml. Ed. 1 Pow. on Devises, by Jarm. 152). But if the will had been republished after the mortgage was made, the legal estate in the mortgaged lands would have passed by the will. (*Beckford* v. *Parnicott*, Cro. Eliz. 493; 1 Pow.

Effect of will on after-acquired land;

—and of republication.

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

said will, and leaving the said A. B., his heir-at-law: AND WHEREAS the said A. B. proved the said will in the Prerogative Court of the Archbishop of Canterbury, on the 9th day of November 1837: AND WHEREAS the said hereditaments comprised in the said indentures of the 17th and 18th days of December, 1827, and firstly hereinafter particularly mentioned, and intended to be hereby released, were purchased by the said G. H. of the said I. K., and the said hereditaments secondly hereinafter mentioned, and intended to be hereby released, were contracted to be purchased by the said G. H. of the said I. K. at the same time, and together with the said hereditaments firstly hereinafter mentioned, and were intended to be comprised in the said indentures of the 17th and 18th days of December, 1827, but were omitted by mistake: AND WHEREAS the said sum of £5,000, together with the sum of £450 for interest on the same, up to the day of the date of these presents is now due and owing to the said A. B. on the aforesaid security for the same: AND WHEREAS the said G. H., with the privity and consent of the said C. D. and E. F., (testified by their severally being parties to and executing these presents), hath contracted with the said A. B. for the sale to him of all the said hereditaments hereinafter particularly mentioned, and intended to be hereby released, and the inheritance thereof in fee simple, free from incumbrances, at or for the price or sum of £5,500: AND WHEREAS, upon the treaty for the said purchase, it was agreed that the said A. B. should, out of the said purchase-money or sum of £5,500, retain the said sums of £5,000 and £450, (making together the sum of £5,450), so due and owing to him for principal and interest as aforesaid, and should pay the sum of £50,

—of probate of will;

—of property having been omitted by mistake, in conveyance to vendor;

—of money due on the first mortgage;

—of contract for sale by mortgagor, with consent of subsequent mortgagees, to the first mortgagee;

—of agreement, that first mortgagee shall retain his debt, and pay balance of purchase-money to mortgagor;

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on Devises, by Jarm. 608, 616; and, hence, the recital in the text). It would, however, be more correct to omit the recital, that the will was not republished, and leave that fact to be assumed in the absence of a statement to the contrary. (See ante, Introduction, page 9, and page 148, note (*a*)).

Stat. 1 & 2 Vict. c. 26.

It should be observed, that, by force of the stat. 1 & 2. Vict. c. 26, s. 3, after-acquired lands would now pass by an existing will, if the will contained a general devise of real estate or other sufficient words.

the residue of the said purchase-money, unto the said G. H.: AND WHEREAS the said C. D and. E. F. have respectively agreed, at the request of the said G. H., and in order to enable him to complete his said contract, to join in these presents, in manner hereinafter mentioned: AND WHEREAS the said I. K. has agreed, at the request of the said G. H., to join in these presents, for the purpose and in manner hereinafter mentioned: AND WHEREAS the said A. B. is desirous that the said hereditaments should be conveyed to the uses and in manner hereinafter mentioned (*d*): AND WHEREAS the said A. B. has agreed to give and execute to the said G. H. such release as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration (*e*) of the said sums of £5,000, and £450, so due

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

—of agreement of subsequent mortgagees to join in conveyance;

—of former owner to join;

—that purchaser is desirous that hereditaments should be conveyed to uses;

—that purchaser shall give release.

Witnesseth,

Consideration.

(*d*) It may be doubted whether this recital is strictly necessary; the uses declared are only the common uses to bar dower, and A. B. does not seem to stand in a situation so different from that of other purchasers, as to require a special recital of his desire to have the property limited in the usual way. It might, indeed, be correct, to have a recital to that effect, in all cases in which the property is not conveyed to the purchaser in fee; but such is not the practice. If, however, the intended limitations are in anywise special, a recital should always be introduced, that the purchaser is desirous to have the property conveyed or limited "to the uses, and in manner hereinafter mentioned," or, "to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements hereinafter limited, declared, and contained."

Recital of the desire of purchaser to have the estate specially limited.

(*e*) If there be more than one witnessing part to an instrument, the whole consideration should (in general) be stated in the first part, and the reference in the subsequent parts be "for the considerations aforesaid." This course is sanctioned by the almost uniform practice of conveyancers, and is recommended by its great convenience, and by its presenting the reader with a view, at one glance, of the whole consideration. It might be more accurate to apportion the consideration in due order among the witnessing parts, but the difficulty of so doing would often be considerable, and the reader would thereby be precluded from seeing at once the true nature and amount of the consideration.

The whole consideration should be stated in the first witnessing part.

Thus, in the text, the first witnessing part is only the appointment

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

and owing to the said A. B., for principal and interest on the aforesaid security for the same, and of the sum of £50. at or immediately before the sealing and delivery of these presents to the said G. H., paid by the said A. B., (the

Receipt.

receipt of which said sum, he the said G. H. doth hereby acknowledge, and of and from the same, and every part thereof, and also of and from the said sums of £5,000, and £450, so due and owing to, and to be retained by the said A. B., as aforesaid, and each of them, and every part thereof, respectively, doth acquit, release, and discharge the said A. B., his heirs, executors, administrators, and assigns, for ever, by these presents, and doth hereby declare the said sums of £5,000, £450, and £50, (making together the said purchase-money, or sum of £5,500), to be in full for the purchase of the said hereditaments, hereinafter particularly mentioned, and intended to be hereby released), and in consideration of the release hereinafter given to the said G. H., by the said A. B., he the said I. K., at the request of the said G. H., and by the direction of the said A. B., (testified by their severally being parties to and executing these presents), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to the said I. K. for this purpose given by the said indenture of the 20th day of September, 1817, as hereinbefore is mentioned; and of all other powers and authorities in anywise enabling him in this behalf, doth, by this present deed or writing, by him sealed and delivered in the presence of, and attested by two credible persons, whose names are intended to be hereupon indorsed, as witnesses to the sealing and delivery of these presents, by him the said I. K., direct, limit, and appoint, that such part of the

Appointment by I. K.

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of a legal estate by a trustee; he appoints, because he is directed to do so by the vendor, and mortgagees, his cestui que trusts, and, therefore, the statement of the consideration moving him is not altogether accurate. But, by this course, we see at once the disposition of the whole purchase-money, and the consideration for the conduct of all the parties, and if we postponed the statement of the consideration to the second witnessing part, we should, in the first, shew no reason for the vendor and mortgagees directing I. K. to appoint.

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

said hereditaments hereinafter particularly mentioned and intended to be hereby released, as was comprised in the said indentures of the 1st and 2nd days of September, 1817, (being the hereditaments hereinbefore referred to as the hereditaments secondly hereinafter mentioned), with their appurtenances, shall henceforth go, remain, and be to the uses, upon the trusts, and subject to the power hereinafter limited, declared, and contained, of and concerning the same: AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreements in this behalf, and for the considerations aforesaid, he the said A. B., with the privity of the said G. H., (testified by his being a party to and executing these presents), and so far as relates to such of the hereditaments hereinafter particularly mentioned, and intended to be hereby released, as were comprised in the said indenture of the 20th day of March, 1828, hath released, and by these presents doth release, and the said C. D., at the request of the said G. H., and by the direction of the said A. B., (testified by their severally being parties to and executing these presents), and so far as relates to such of the hereditaments hereinafter particularly mentioned and intended to be hereby released, as were comprised in the said indenture of the 20th day of July, 1834, hath released, and by these presents doth release, and the said I. K., at the like request and direction, (testified as aforesaid), and so far as relates to such of the hereditaments hereinafter particularly mentioned, and intended to be hereby released, as were comprised in the said indentures of the 1st and 2nd days of September, 1817, hath granted, aliened, released, and confirmed, and by these presents doth grant, alien, release, and confirm, and the said E. F., at the like request and direction, (testified as aforesaid), and so far as relates to such of the hereditaments hereinafter particularly mentioned, and intended to be hereby released, as were comprised in the said indenture of the 30th day of April, 1835, and to the intent that the said term of 1,000 years thereby granted, may be merged and extinguished in the reversion of the premises comprised in the said term, hath (*f*) surrendered, and by these presents

Witnesseth, secondly.

Conveyance by all parties,

—and surrender of term.

(*f*) The word "assign" is sometimes used in surrenders of terms, Operative

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

doth surrender, and the said G. H., by the direction of the said A. B., (testified as aforesaid), and as to all and singular the hereditaments hereinafter particularly mentioned, and intended to be hereby released, hath granted, aliened, released, and confirmed, and by these presents doth grant, alien, release, and confirm, unto the said L. M., (in his actual possession now being, by virtue of a bargain and sale thereof to them made by the said A. B., C. D., I. K., and G. H., in consideration of five shillings a-piece &c., [*see Precedent XVI. p.* 198], and his heirs: FIRSTLY, ALL THAT &c., [*parcels hereinbefore referred to, as the* "hereditaments firstly hereinafter particularly mentioned"]: SECONDLY, ALL THOSE &c., [*parcels hereinbefore referred to as the* "hereditaments secondly hereinafter particularly mentioned"], all which said premises, firstly and secondly hereinbefore described, are now better known by the description, and contain the quantities set forth in the schedule hereunto written, or hereunto annexed, [*general words*]; To HAVE AND TO HOLD the said —— and hereditaments, and all and singular other the premises hereby released or expressed, and intended so to be, unto the said L. M., and his heirs, (freed and absolutely discharged from all principal monies and interest in anywise due or owing upon or by virtue of the said hereinbefore recited securities, or any of them), to the uses, upon the trusts, and subject to the power hereinafter limited, declared, and contained of and concerning the same: AND IT IS HEREBY AGREED AND DECLARED between and by the parties to these presents,

Parcels.

Habendum.

Declaration of uses.

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words of surrenders.

but as the intention is to surrender and merge, "assign" does not seem to be an appropriate word. Of course, it would be equally effectual, for if, by any act of the parties, an estate, susceptible of merger, be conveyed to the owner of an estate, in which it can be merged, merger will enure, whether such was the intention of the parties or not, and independently of the operative words employed. (See 6 Cru. Dig. by White, p. 487, note (*a*)). "Yield up" is sometimes added, but "surrender" alone is sufficient. The term in the text is merged, instead of being assigned to attend the inheritance; because, having been created when the legal estate was outstanding, it is merely equitable, and would be no protection to the purchaser.

that the direction, limitation, and appointment, grants, releases, and confirmations hereinbefore contained, shall respectively operate and enure, [*to common uses, to bar dower in favour of A. B., with a declaration to preclude a future wife from dower, see Precedent XVII. p.* 214]; AND each of them the said C. D. and E. F., so far only as relates to his own acts and deeds, doth hereby for himself, his heirs, executors, and administrators, covenant with the said L. M. (*g*) and his heirs, that they the said C. D. and E. F., respectively, have not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said hereditaments and premises hereinbefore by them respectively released and surrendered or expressed, and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever: AND THE SAID G. H. doth hereby for himself, his heirs, executors, and administrators, covenant with the said L. M. and his heirs, in manner following, (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever, by him the said G. H. made, done, committed, or executed, or knowingly or willingly suffered to the contrary, they the said A. B., C. D., E. F., and G. H., now have in themselves respectively, good right, full power, and lawful and

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

Covenants by the mortgagees.

Covenants by vendor as to hereditaments first mentioned;

—for right to convey, &c.;

(*g*) It will be observed, that the covenants in this deed are entered into with the trustee and his heirs, and not with the purchaser, because the trustee is the releasee to uses; for as the purchaser was the person who conveyed the legal estate, he could not himself be the releasee. (See ante, Precedent XXI. p. 232, note (*o*)). Afterwards, in the covenants which relate to the lands taken by appointment, the covenants are made as well with the trustee and his heirs, as with the purchaser, his heirs and assigns. In this case, there being no proper releasee, there is no proper covenantee; the purchaser and his heirs will have the benefit of the covenant, but not his appointees or assigns. (See the note above cited). The covenants are entered into with the trustee likewise, on the chance that the appointment may have been inoperative, and that the release will operate.

Covenants entered into with releasee;

—and also with purchaser.

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

absolute authority to grant, alien, release, confirm, and surrender the said hereditaments firstly hereinbefore particularly mentioned, and hereinbefore released, or expressed and intended so to be, with their appurtenances (*h*), to the said L. M. and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents: AND THAT the said hereditaments and premises firstly hereinbefore particularly mentioned, and hereinbefore released, or expressed and intended so to be, with their appurtenances, shall and may, from time to time, and at all times hereafter, go and remain to the uses, upon the trusts, and subject to the power hereinbefore limited, expressed, and declared, and be peaceably and quietly entered into and upon, and be held, occupied, possessed, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by them the said C. D., E. F., and G. H., or any of them, their or any of their heirs, executors, or administrators, or of or by any other person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them or any of them; AND THAT free and clear, and freely, and clearly, and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said G. H., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered, by the said C. D., E. F., and G. H., or any of them, their or any of their heirs, executors, administrators, or assigns, or any

—for quiet enjoyment;

—free from incumbrances;

(*h*) The phrase, "with the appurtenances," is used in these covenants, because, as there are two sets of parcels with the general words in common, we cannot say, as usual, "the hereditaments and *premises firstly* hereinbefore mentioned," without excluding the appurtenances; for the appurtenances are not among the premises firstly mentioned, but among the premises generally mentioned.

"Appurtenances"—why used in the covenants.

person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them or any of them: AND FURTHER THAT they the said C. D., E. F., and G. H., and every of them, their and every of their heirs, executors, and administrators, and all and every other person and persons whomsoever, having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises firstly hereinbefore particularly mentioned, and hereinbefore released or expressed, and intended so to be, or any of them, or any part thereof, or the appurtenances thereto, by, from, under, or in trust for them the said C. D., E. F., and G. H., or any of them, their or any of their heirs, executors, or administrators, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said A. B., his appointees, heirs, or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, things, devices, assignments, surrenders, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, surrendering, conveying, and assuring of the said hereditaments firstly hereinbefore particularly mentioned, and hereinbefore released or expressed, and intended so to be, and every part thereof, with their appurtenances, to the uses, upon the trusts, and subject to the power hereinbefore limited, expressed, and declared, as by the said A. B., his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required: AND EACH of them the said G. H. and I. K., so far only as relates to his own acts and deeds, and the acts and deeds of his appointees, heirs, executors, administrators, and assigns, and of the persons claiming or to claim through or under him or them, doth hereby covenant with the said L. M. and his heirs, and also with the said A. B., his appointees, heirs, and assigns, in manner following; (that is to say), that for and notwithstanding any act, deed,

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

—for further assurance.

Covenants by vendor and former owner as to the hereditaments secondly mentioned.

CONVEYANCE BY MORTGAGOR AND MORTGAGEES.

matter, or thing whatsoever, by them the said G. H. and I. K. respectively made &c.; [*Covenants that the power exercised by I. K. was well created and is in force:—that I. K. has right to appoint; and that I. K. and G. H. respectively have right to grant and release* "the hereditaments secondly hereinbefore particularly mentioned;"—*to be quietly enjoyed—free from incumbrances—and for further assurance. See covenants in Precedent XXI. page 233 (i)*]:

Witnesseth, lastly, release by mortgagee to mortgagor.

AND THIS INDENTURE ALSO WITNESSETH (*k*), that, in pursuance of the said agreement in this behalf, and in consideration of the premises, he the said A. B. hath acquitted, released, and discharged, and by these presents doth acquit, release, and discharge the said G. H., his heirs, executors, and administrators, and his and their estates and effects, of and from the said principal sum of £5,000 so due and owing to the said A. B. upon the aforesaid security for the same, as hereinbefore is mentioned, and every part thereof, and of and from all interest now due or henceforth to grow due for the same or any part thereof, and of and from all actions, suits, accounts, reckonings, claims, and demands whatsoever, either at law or in equity, for or in respect of the said principal money or interest, or any part thereof respectively, or for or in respect of any act, matter, or thing, in anywise relating thereto. IN WITNESS &c.

THE SCHEDULE above referred to, *or* referred to in the annexed indenture.

(*i*) There is no exact form, in this work, of the covenants required; but they are not difficult to construct, and to introduce them, would encroach too much on the space allotted to other matters. The same remark will apply in other cases.

Release to mortgagor by mortgagee.

(*k*) This release is of little value to the mortgagor, because the deed containing it will remain in the possession of the mortgagee. The mortgagor should take a separate receipt for the amount of the mortgage debt; and, if the case seem to require a release by deed, (as where there have been complicated accounts or arrangements), he will do well, either to have an attested copy of the purchase deed, or a release by a separate deed.

XXVII.

CONVEYANCE *by a* VENDOR *and a* MORTGAGEE *of* PART *of the Estate—the Mortgage Debt and two other Sums secured by two* TERMS *of Years being paid off out of the Purchase-money; one of the* TERMS *is* ASSIGNED *to attend, and the other is* MERGED.

CONVEYANCE —ASSIGNMENT AND SURRENDER OF TERMS.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*mortgagee*], of the first part; C. D., of &c. [*vendor*], of the second part; E. F., of &c.; and G. H., of &c. [*the parties beneficially interested in the sums secured by one of the terms*] of the third part; I. K., of &c. [*trustee of the first term*], of the fourth part; L. M., of &c. [*trustee of the second term*], of the fifth part; N. P., of &c. [*purchaser*], of the sixth part; Q. R., of &c. [*dower trustee*], of the seventh part; and S. T., of &c. [*trustee to whom the first term is assigned*], of the eighth part: [*recitals shewing the creation of and the title to the terms and monies secured by them —and the creation of the mortgage*]: AND WHEREAS the the said C. D. is seised or entitled for an estate of inheritance in fee simple in possession, free from incumbrances of or to the messuages, lands, and other hereditaments secondly hereinafter particularly mentioned, and intended to be hereby released: AND WHEREAS the said N. P. contracted and agreed with the said C. D. for the absolute purchase of all the messuages, lands, and other hereditaments hereinafter particularly mentioned, and intended to be hereby released, and the inheritance thereof, in fee simple in possession, free from incumbrances, (except as hereinafter is mentioned), at or for the price or sum of £6,000: AND WHEREAS the said sum of £1,325 still remains due and owing to the said A. B. upon the security

Parties.

Recitals.

Recital of vendor being seised in fee of the hereditaments secondly to be mentioned;

—of contract for purchase;

—of mortgage debt being still due;

CONVEYANCE —ASSIGNMENT AND SURRENDER OF TERMS.

of the said indenture of the 12th day of November, 1818, [*the mortgage deed*], but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS the said sum of £2,000 raiseable under the trusts of the said term of 1,000 years, created by the said Indenture of the 30th day of December, 1766, still remains due; but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS the said sum of £2,000 raiseable under the trusts of the said term of 1,000 years, created by the said indenture of the 14th day of June, 1796, still remains due; but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS, upon the treaty for the said purchase, it was agreed that the said sum of £1,325 should be paid to the said A. B. out of the said purchase-money or sum of £6,000; and that the said sum of £2,000 raiseable under the trusts of the said term of 1,000 years, created by the said indenture of the 30th day of December, 1776, and by the said will of the said X. Y. (*a*), directed to be paid to the said E. F. and G. H. as aforesaid, should also be paid out of the said purchase-money or sum of £6,000 in manner hereinafter mentioned; and that the said sum of £2,000 raiseable under the trusts of the said term of 1,000 years, created by the said indenture of the 14th day of June, 1796, should also be paid out of the said purchase-money or sum of £6,000 to the said L. M. as hereinafter is mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the sum of £1,325 to the said A. B., at or immediately before the sealing and delivering of these presents paid by the said N. P., at the request and by the

—of sum due under the first term;

—of sum due under the second term;

—of agreement, for payment of the debts out of the purchase-money.

Witnesseth.

Consideration.

(*a*) It may be needful to mention, that the money raiseable under the first term referred to, was subject to the appointment of X. Y., and that he exercised this power by his will. Both the first and second terms were assigned, (with the consent of the persons beneficially interested in them), to the existing trustees thereof, I. K. and L. M., by the mortgage deed of the 12th of November, 1818, with the intention of giving priority to the mortgage over the monies raiscable under the trusts of the terms.

direction of the said C. D., (testified &c.), (the receipt of which said sum of £1,325, the said A. B. doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns, and also the said N. P., his heirs, executors, administrators, and assigns for ever, by these presents, and doth declare the same to be in full satisfaction and discharge of all principal monies and interest due and owing to him the said A. B. on the said indenture of the 12th day of November, 1818); and also in consideration of the sum of £2,000 at the same time paid by the said N. P. to the said E. F. and G. H., at the request and by the direction of the said C. D., (testified as aforesaid), and with the privity and consent of the said I. K., (testified &c.), (the receipt and payment in manner aforesaid, of which said sum of £2,000, they the said E. F., G. H., and I. K., do and each of them doth hereby acknowledge &c. (ut supra)), and in consideration of the sum of £2,000 at the same time paid by the said N. P. to the said L. M. (*b*), at the request and by the direction of the said C. D., (testified as aforesaid), and with the privity and consent of the said E. F. and G. H. (*b*), (testified &c.), (the receipt and payment, &c., ut supra); and also in consideration of the sum of £675 to the said C. D., at the same time paid by the said N. P., (the payment and receipt in manner aforesaid, of which said sums of £1,325, £2,000, £2,000, and £675, he the said C. D. doth hereby acknowledge, and of and from the same &c.); he the said A. B., at the request and by the direction of the said C. D., (testified &c.), and according to the estate and interest of him the said A. B, therein, hath released, and by these presents doth release, and the said C. D. hath granted, aliened, released, and confirmed, and by these presents doth grant, alien, release, and confirm unto the said N. P.,

Receipt.

Further consideration.

Further consideration.

Further consideration.

Conveyance.

(*b*) E. F. and G. H. were interested in certain shares only of the money raiseable under the trusts of the second terms, but L. M., the trustee of the term, had power to give receipts to the persons advancing or paying the money. Of course, the facts noticed in this and the preceding note appeared on the recitals.

CONVEYANCE —ASSIGNMENT AND SURRENDER OF TERMS.

(in his actual possession now being, by virtue of a bargain and sale thereof to him made by the said A. B. and C. D., in consideration of five shillings a-piece &c., *see Precedent XVI. p.* 198), and his heirs: FIRSTLY, ALL THAT &c., [*parcels subject to the mortgage and portions*]: SECONDLY, ALL THAT &c., [*parcels of which the vendor is seised in fee*], [*general words*]: TO HAVE AND TO HOLD the said messuages, lands, hereditaments, and all and singular other the premises hereby released or expressed, and intended so to be, with their appurtenances, unto the said N. P. and his heirs, (freed and discharged from the said sum of £1,325, and all interest for the same, but subject, as to the said premises called or known as ——, to an annual payment of £2. 11*s.* 5*d.*), and as to all and singular the said premises, [*to uses to bar dower with a declaration as in Precedent XVII. p.* 214], [*covenant by A. B. with N. P. against incumbrances, see page* 249]: AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations aforesaid, he the said I. K., at the request and by the direction of the said several persons, parties hereto, of the first, second, and third parts respectively, and upon the nomination and appointment of the said N. P., (testified &c.), hath assigned, and by these presents doth assign unto the said S. T., his executors, administrators, and assigns: ALL SUCH and so many and such part and parts of the said messuages, lands, hereditaments, and premises hereinbefore released or expressed, and intended so to be, as by the said indenture of the 12th day of November, 1818, were assigned to the said I. K., his executors, administrators, and assigns, for the residue then to come of the said term of 1,000 years, created by the said indenture of the 30th day of December, 1766, and all the estate &c.: TO HAVE AND TO HOLD the said messuages, lands, and other hereditaments, and all and singular other the premises hereinbefore assigned or expressed, and intended so to be, unto the said S. T., his executors, administrators, and assigns, for all the residue now to come of the said last-mentioned term of 1,000 years IN TRUST for the said N. P., his heirs, appointees, and assigns, and to assign and dispose of the same, as he or they shall, from time to time, direct or appoint, and in

Habendum.

Subject to an annual payment.

To uses.

Mortgagee's covenant.

Witnesseth, secondly, assignment of first term.

Parcels of term.

Habendum.

In trust.

CONVEYANCE —ASSIGNMENT AND SURRENDER OF TERMS.

the meantime, upon trust, to permit the residue of the said term to wait upon and attend the reversion, freehold, and inheritance of the premises therein comprised, and to protect the same from all mesne incumbrances, if any such there be, [*covenant by I. K. with S. T., his executors, administrators, and assigns, against incumbrances, see page 253, and note (g), page 249*]: AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations aforesaid, he the said L. M., at the request and by the direction of the said several persons, parties hereto, of the first, second, and third parts respectively, and on the acceptance of the said N. P., (testified &c.), hath surrendered, and by these presents, doth surrender unto the said N. P., ALL SUCH and so many and such part and parts of the said messuages, lands, and other hereditaments and premises hereinbefore released or expressed, and intended so to be as by the said indenture of the 12th day of November, 1818, were assigned to the said L. M., his executors, administrators, and assigns, for the residue then to come of the said term of 1,000 years, created by the said indenture of the 14th day of June, 1796, and all the estate &c., TO THE END and intent that the said last mentioned term of 1,000 years may be merged and extinguished in the reversion and inheritance of the premises therein comprised (*c*), [*covenant by L. M. with N. P., his executors, administrators, and assigns, against incumbrances, see page 253, and note (g), page 249*], [*covenants by C. D. with N. P., for seisin,* " as to the hereditaments secondly hereinbefore particularly mentioned," *and as to all the hereditaments—for right to convey —for quiet enjoyment, free from incumbrances—for further assurance, pages 201 and 263*]. IN WITNESS &c.

Witnesseth, thirdly, surrender of second term.

Parcels of term.

To be merged.

(*c*) An habendum is sometimes added to a surrender; but as the interest is always intended to be merged, and (if the circumstances admit) is merged by the surrender itself, the addition of an habendum of that which has ceased to exist seems incorrect. It is more usual to add a declaration of the intent as is done in the text; but even that is more for the sake of shewing the meaning of the parties than with a view to the legal effect. The merger would ensue without any declaration of intent. (See ante, p. 262, note (*f*)). The old forms, it may be observed, contain habendums; West's Symbolography, s. 462, 463.

Habendum to a surrender not appropriate.

XXVIII.

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

CONVEYANCE *of* FREEHOLDS *and* PEWS *in a* PARISH CHURCH—ENFRANCHISEMENT *of* COPYHOLDS—AND RELEASE *of* QUIT-RENTS—*the* WIFE *of the Vendor joins for the Purpose of* RELEASING *two equitable* RENT-CHARGES.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*vendor*], and E. B., his wife, of the first part; C. D., of &c. [*purchaser*], of the second part; and E. F., of &c. [*trustee*], of the third part: [*recites agreement by A. B., on his marriage, to secure to his wife two annuities of £200 and £1,200 respectively, to be charged on all his hereditaments*]: AND WHEREAS the said A. B. is seised or entitled of or to the manor of D., in the county of S., with its rights, members, and appurtenances, for an estate of inheritance in fee simple, in possession, free from incumbrances: AND WHEREAS the said C. D. is seised or entitled for an estate of inheritance to him and his heirs, according to the custom of the said manor, of or to the messuages, lands, and other hereditaments, comprised in the second schedule hereunder written, or hereunto annexed: AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him, of the messuages, lands, and other hereditaments, comprised in the first schedule hereunder written, or hereunto annexed, with their appurtenances, and of the two pews hereinafter mentioned, and the inheritance of the same premises respectively in fee simple, in possession, free from incumbrances; and also for such enfranchisement to the said C. D., as is hereinafter contained, of the said copyhold, messuages, lands, and hereditaments, comprised in the said second schedule to these presents, with their respective

Recital of annuities agreed to be charged.

Recital, that vendor is seised in fee of a manor;

—that purchaser is seised in fee of copyholds;

—of contract for sale, enfranchisement, and release of quit-rents;

appurtenances, and also for such grant of common as is hereinafter contained, and for such release of quit-rents and chief-rents as is hereinafter contained, at or for the price or sum of £——: AND WHEREAS the said E. B., being satisfied that the said annuities of £200 and £1,200 are otherwise adequately secured, hath agreed to join in these presents for the purpose and in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £——, at or immediately &c., the receipt &c., [*see Precedent XVI. p.* 194], he the said A. B. hath granted, aliened, released, and confirmed, and by these presents, doth grant, alien, release, and confirm, and the said E. B., with the concurrence of the said A. B., (testified by his being a party to and executing these presents), and for the purpose of releasing and extinguishing her right of dower of or in the hereditaments next hereinafter mentioned, and of discharging the same from payment of the said annuities of £200 and £1,200, doth, by these presents, release and dispose of unto the said C. D., (in his actual possession &c., [*see Precedent XVI. p.* 198]), and his heirs, ALL AND SINGULAR the messuages, lands, and hereditaments, comprised and mentioned in the first schedule hereunder written, or hereunto annexed; and also all those two pews in the chancel of the parish church of D. aforesaid, numbered four and five, and appurtenant to the messuages aforesaid (*a*):

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

—of agreement to release annuities.

Witnesseth.

Conveyance of freeholds and pews.

Parcels of the lands, &c. by reference to schedule.

Pews.

(*a*) The freehold of a parish church is in the parson, whether lay or spiritual; but the use of the body of the church is in the parishioners, and the disposing of the seats belongs to the ordinary. (Gibson's Codex, tit. ix. chap. 4, art. *Rules of Common Law concerning the ordering and repairing of Seats; Pettman* v. *Bridger*, 1 Phil. 323; *Fuller* v. *Lane*, 2 Addams, 425). By custom, however, the disposition of the seats may belong to the churchwardens. (Burn's Eccles. Law, (*Church*), s. 7).

Pews in the body of a church.

The right to pews in a church may be claimed as an easement appurtenant to a messuage, either by a grant from the ordinary, (which is called a faculty), or by prescription, which presumes a grant to have been formerly made. (*Rogers* v. *Brooks*, 1 T. R. 431; *Stocks* v. *Booth*, 1 T. R. 428; *Mainwaring* v. *Giles*, 5 B & Ald. 356; and cases there cited; *Morgan* v. *Curtis*, 3 Man. & Ry. 389; *Griffiths* v. *Mat-*

Pews may be claimed as appurtenant to a house by faculty or prescription.

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

[*general words*], TO HAVE AND TO HOLD the said messuages, lands, pews, and hereditaments, and all and singular other

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Habendum to uses.

thews, 5 T. R. 296). The period and nature of enjoyment formerly required for the presumption of a faculty, may be deduced from the above cases, and the authorities cited in them; but, now, by the stat. 2 & 3 Will. 4, c. 71, s. 2, an enjoyment for twenty years is sufficient to make a right to an easement, unless it be shewn that the right was first enjoyed at some time prior to the period of twenty years; and enjoyment for forty years confers an absolute right. This doctrine must, however, be taken subject to the exceptions made by the 7th and 8th sections of the statute, and to the construction of the statute established by the cases referred to ante, p. 213, note (*h*).

Right to pews by faculty and prescription.

The right to a pew cannot be severed from the messuage to which it is appurtenant; the tenant of the messuage for the time being has also de jure, for the time being, the right to the pew. (Per Lord Stowell, 1 Hagg. 319). A pew cannot be claimed as appurtenant to land, but only to a messuage, because it is for the use of the inhabitants; (Burn's Eccles. Law, (*Church*), vii. 9; Co. Lit. 121. b.); but the messuage may be in another parish, and that whether the pew be in the body of the church or in an aisle. (*Davis* v. *Witts*, Forrest, 14; *Lousley* v. *Hayward*, 1 You. & Jerv. 583). A faculty may be granted to any man who is a parishioner, but not to a man and his heirs; (*Stocks* v. *Booth*, 1 T. R. 428); and no non-parishioner can claim a pew by any other title than that of prescription. (*Byerley* v. *Windus*, 3 B. & C. 1). The right to a pew may be apportioned. (*Harris* v. *Drewe*, 2 B. & Ad. 164); and priority in a pew may be prescribed for. (*Carleton* v. *Hutton*, Noy, 78; Latch, 116).

Jurisdiction as to pews.

It is only when a pew is claimed by faculty or prescription that the Courts of Common Law have jurisdiction; in other cases, the right to pews is a matter entirely of ecclesiastical jurisdiction. (*Mainwaring* v. *Giles*, *Byerley* v. *Windus*, ubi supra; *Witcher* v. *Cheslam*, 1 Wils. 17). Of course, conveyancers have to deal only with pews which are claimed by faculty or prescription.

Repairs of pews prescribed for.

It seems that a person prescribing for a pew, must shew that the owners of the messuage to which he alleges it to be appurtenant, were used to repair the pew. (*Kenrick* v. *Taglor*, 1 Wils. 323; *Pettman* v. *Bridger*, 1 Phill. 316; see, however, *Fiske* v. *Revit*, Lofft, 423; 2 Rolle's Abr. 288).

Remedies for disturbance in the use of pews.

Tresspass will not lie for a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. (1 T. R. 430; *Dawtrie* v. *Dee*, 2 Roll. Rep. 139, Palm. 46; see, however, the remarks of Best, C. J., in *Spooner* v. *Brewster*, 3 Bing. 136). The remedy for disturbance is by action on the case; (Noy, 78; 1 Sid. 88; Sir T. Jones, 3; 3 Keble, 745; Wats. Cler. Law. c. 39); or by suit in the Ecclesiastical Court when the

the premises hereinbefore granted and released, or expressed and intended so to be, unto the said C. D. and his heirs,

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

faculty or prescription is not disputed. (2 Salk, 551; Lord Raym, 755; *Byerley* v. *Windus*, ubi supra).

Pews in the chancel.

The preceding remarks apply principally to the pews in the body of the church; the law, with regard to pews in the chancel, is somewhat uncertain; (Rep. of Eccles. Comm. of 1832, p. 130); although it appears in the main to be the same as for those in the body of the church. The parson is entitled to the chief seat in the chancel; (*Hall* v. *Ellis*, Noy, 133; Bulst. 151); but the ordinary may grant to other persons the right to have pews there; (1 B. & Ald. 506); and, consequently, it is apprehended that pews in the chancel may be prescribed for. A grant in fee by the parson of the chancel, or any part of it, is not good, as it is inalienably annexed to the parsonage; and, therefore, the grantee, or those claiming under him, cannot maintain trespass against the parson for the time being for pulling down their pews, (*Clifford* v. *Wicks*, 1 B, & Ald. 498; see, however, the observation of Abbott, C, J,, 5 B. & Ald. 361). It is said, that a vicar has a right to a seat in the chancel. (Burn's Eccles. Law, (*Church*), vii. 13; and, for further information on the subject of pews, see the same work, (*Church*), vii.

An aisle may be claimed by faculty or prescription.

An aisle, or a pew in an aisle, may be appurtenant to a house, either by faculty or prescription. (*Frances* v. *Ley*, Cro. Jac. 366; *Barrow* v. *Kew*, 2 Keb. 342; *Davis* v. *Witts*, Forrest, 14; *Pym* v. *Godwin*, Moore, 878; Burn's Eccles. Law, (*Church*), iv.).

Pews pass as appurtenances.

It is apprehended, that as the pews are appurtenant to the messuages, and cannot be severed, they would pass with the messuages under the general words, or even without the use of any general words, (See 1 Hagg. 319).

The law with regard to vaults or places of burial, seems to be nearly the same as that in respect of pews. (8 B. & C. 295). The inhabitants of a parish have a common-law right to be buried in the churchyard; (Degge's Parson's Law, part 1, c. 12; Burn's Eccles. Law, (*Burial*), 258; Comyn's Dig. (*Cemetery*), B,; *Andrews* v. *Cawthorne*, Willes, 536; *Rex* v. *Coleridge*, 2 B. & Ald. 806); and the incumbent may permit a person to be buried in the church. (Gibson's Codex, 453).

The right to bury in a separate vault, or in an aisle, or the quire or chancel, may be prescribed for as appurtenant to a messuage; (Comyn's Dig. (*Cemetery*), B.; *Waring* v. *Griffiths*, 1 Burr. 440); and may therefore be granted by faculty. (*Bryan* v. *Whistler*, 8 B. & C. 288). But the parson alone cannot grant the separate use of a vault. (S. C.). And a claim to bury in any particular part of a churchyard cannot be supported, otherwise than by a faculty or prescrip-

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

to the uses, upon the trusts, and subject to the power hereinafter limited, declared, and contained: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements and for the considerations aforesaid, he the said A. B. hath enfranchised, and for that purpose granted, released, and confirmed, and by these presents doth enfranchise, grant, release, and confirm (*b*), and the said E. B. &c., [ut supra], unto the said C. D. (in his actual possession &c., [*see Precedent XVI. p.* 198]), and his heirs, ALL THOSE messuages, lands, tenements, and

Witnesseth, secondly.

Enfranchisement of copyholds.

Parcels.

General words.

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tion. (*Fryer* v. *Johnson*, 2 Wils. 28; *Ex parte Blackmore*, 1 B. & Ad. 122). And if the claim be by a faculty to bury in the church, it would seem, that the parson as well as the ordinary must have concurred. (*Frances* v. *Ley*, Cro. Jac. 366; Gibson's Codex, 542; *Bryan* v. *Whistler*, ubi supra).

The right to a vault is an easement; and in case of disturbance, an action on the case and not of trespass, is the remedy. (Comyn's Dig. (*Cemetery*), B.; 8 B. & C. 294).

With respect to the law of tombs and monuments. (See Comyn's Dig. (*Cemetery*), C.; Co. Lit. 18. b.; *Spooner* v. *Brewster*, 3 Bing. 136; S. C. 10 J. B. Moore, 494; 2 C. & P. 34; *Beckwith* v. *Harding*, 1 B. & Ald. 508).

Enfranchisement.

(*b*) An enfranchisement is the conversion of copyhold into freehold tenure, and is effected by the lord either conveying the fee simple to the copyholder, or releasing to him the seignorial rights. (Scriven on Copyholds, ch. xiv.; Burton's Law of Real Property, art. 1351; Cru. Dig. tit. x. ch. vi. s. 12, 19; ante, Vol. I. p. 169). The lord must either be seised of the fee simple of the manor, or have a power to enfranchise; but it is not necessary for the copyholder to have the whole copyhold estate in him. (See the authorities above cited).

The practice of conveyancers, when the lord is seised in fee, is, to make the enfranchisement by lease and release of the fee—not simply by release of the seignorial rights; when the enfranchisement is under a power, the terms of the power must be complied with. (See the Precedent of such an enfranchisement, infra). The word enfranchise does not seem to have any technical operation; it is used to express the intention of the conveyance. As the copyholder, by accepting an enfranchisement, takes the title to the manor, subject to all rights and incumbrances affecting it, the wife of the lord joins in the enfranchisement, for the purpose of releasing her right of dower. (See ante, Vol. I. p. 170; 1 Prest. Ab. 302).

hereditaments, comprised and mentioned in the said second schedule hereunder written, or hereunto annexed, [*general words—inserting immediately before* " and the reversion"—" and all heriots, quit-rents, duties, suit and service of court, and all other customs and services due and payable for or in respect of the same premises, or any of them"]: TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereinbefore enfranchised, granted, and released, or expressed and intended so to be, unto the said C. D. and his heirs, (freed and absolutely discharged from the copyhold tenure thereof, and of and from all rents, fines, payments, heriots, suits, customs, and services incident thereto, or by custom, prescription, or otherwise howsoever, to be paid, rendered, or performed to the lord or lady, lords or ladies of the said manor of D. for the time being, for or in respect of the same premises, or any of them) (*c*), to the uses &c., [ut supra]: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, he the said A. B. hath granted and confirmed, and by these presents doth grant and confirm, and the said E. B. &c., [ut supra], unto the said C. D. and his heirs, ALL SUCH COMMONAGE and right or title to common, of what nature or kind whatsoever, in, upon, and over all or any of the wastes, commons, and commonable lands of or belonging to the said manor of D., as the said C. D., or any of his ancestors, or any

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

Habendum.

—freed from copyhold tenure and services,

To uses.

Witnesseth, thirdly.

Grant of common.

(*c*) The words in the parenthesis are, perhaps, properly retained, as putting the meaning of the parties beyond a doubt; but they cannot be deemed essential, for it is clear, that the effect of an enfranchisement per se, is, to free the lands from the ancient rents and services, and that they could not, by reason of the statute quia emptores, be saved even by an express reservation. (*Bradshaw* v. *Lawton*, 4 T. R. 443).

A deed of enfranchisement should be inrolled on the court rolls, or where (as in the case in the text) the inrolment would be inconvenient and expensive, from the length of the deed; a notice of it should be entered on the rolls. Not that an inrolment or notice on the rolls is essential, but that it is a convenient mode of preserving evidence of the enfranchisement.

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

person or persons through whom the said C. D., or any of his ancestors, claim, held, possessed, or enjoyed in respect of, and as appurtenant or belonging to, all or any part of the messuages, lands, hereditaments, and premises hereinbefore enfranchised, or expressed and intended so to be, and the freehold and inheritance of all such commonable rights as aforesaid, in as large, ample, and beneficial manner, to all intents and purposes, as the said C. D., or any of his ancestors, or any person or persons through whom the said C. D., or any of his ancestors, claim, hath or have heretofore used and exercised all or any of the said rights and privileges, or as he or his customary heirs could or might have used or exercised the same if the aforesaid messuages, lands, hereditaments, and premises had not been enfranchised (*d*): TO HAVE AND TO HOLD the said right of common, and all and singular other the premises lastly hereinbefore granted, or intended so to be, unto the said C. D. and his heirs, to the uses &c., [ut supra] (*e*): AND THIS

Habendum.

To uses.

(*d*) The right of common in the waste of the lord *within* the manor is lost by enfranchisement, even though the conveyance of the copyhold be with all *appurtenances*. (Scriven on Copyholds, ch. xiv., and cases there cited). But a re-grant of the common may be made by sufficient words; (*Worledge* v. *Kingswell*, Cro. Eliz. 794); and is always inserted as a usual part of a deed of enfranchisement.

Even if the right of common were not re-granted, it would subsist in equity. (*Styant* v. *Staker*, 2 Vern. 250).

A right of common in the waste of the lord *without* the manor, or a right of way over another tenement, or any other easement which belongs to the land, and not to the copyhold estate, is not extinguished by enfranchisement. (Scriven, ubi supra).

(*e*) When the copyholder holds any other lands than those which are intended to be enfranchised, it has been usual to insert in the enfranchisement deed a proviso, "that nothing herein contained shall enfranchise, acquit, or discharge any tenements or hereditaments, held of the lord of the said manor, other than and except the tenements and other hereditaments hereinbefore particularly mentioned, and hereby released, or expressed and intended so to be, of and from the copyhold, or customary tenure thereof, or of or from any rents, payments, heriots, suits, customs, or services incident thereto, or to be paid, rendered, or performed in respect thereof." But the proviso is clearly superfluous, and should be omitted.

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements and for the considerations aforesaid, he the said A. B. hath remised, released, and quit claimed, and by these presents doth remise, release, and quit claim, and the said E. B. &c., [ut supra], unto the said C. D. and his heirs, ALL THOSE, the quit-rents or chief-rents, or other rents or payments whatsoever, payable to the said A. B., out of or chargeable upon all or any of the messuages, land, and other hereditaments, comprised in the said first (*f*) schedule to these presents, or any of them, TO THE END and intent, that the said last-mentioned hereditaments and premises may be held freed and discharged from the said quit-rents, chief-rents, and other rents and payments, and every of them: AND IT IS HEREBY agreed and declared, between and by the parties to these presents, that the several grants, releases, enfranchisements, confirmations, and dispositions hereinbefore made, shall, as to the hereditaments and premises hereinbefore granted, released, enfranchised, and disposed of respectively, or expressed and intended so to be, operate and enure to such uses, &c., [*uses to bar dower with a declaration as in Precedent XVII. p.* 214], [*covenants by A. B. for title,* " of or to the said manor of D., with the appurtenances, and of or to the said hereditaments and premises hereinbefore granted

Witnesseth, fourthly, release of quit-rents.

Declaration of uses.

Covenants for title.

There must be a covenant to produce the title deeds of the manor, which should, however, according to the usual practice, be taken by a separate deed.

(*f*) The rents expressed to be released, are said to be issuing out of the lands in the first schedule, but as these lands belonged to the vendor, and have, by a previous witnessing part, been conveyed by him to the purchaser, the necessity of the separate release of quit-rents does not appear. The form, however, has been retained, as it will serve for a Precedent. Probably, the lands conveyed were demesne lands of the manor, which had formerly been granted, under certain rents, and had, afterwards, come again into the hands of the lord; although, even if that were the case, the release in the text would hardly be necessary.

Chief-rents are the rents paid by the freeholders of manors; quit-rents those paid by the copyholders. (Cru. Dig. tit. xxviii. ch. 1, s. 12; 2 Inst. 19).

CONVEYANCE OF FREEHOLDS AND PEWS, AND ENFRANCHISEMENT OF COPYHOLDS.

and released, or expressed and intended so to be, and every part thereof, (subject as to such of the said hereditaments as are hereinbefore enfranchised, or expressed and intended so to be, to the copyhold or customary estate subsisting therein), for a good &c.," *for quiet enjoyment—free from incumbrances—for further assurance, see Precedents XVI. and XVII. pp.* 201, 216]. IN WITNESS &c.

FIRST SCHEDULE above referred to, *or*, referred to in the annexed Indenture.

SECOND SCHEDULE above referred to, *or*, referred to in the annexed Indenture.

XXIX.

CONVEYANCE TO USES OF A SETTLEMENT.

CONVEYANCE *to the* USES *of a* SETTLEMENT, *on a Purchase by the Trustees.*

Parties.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*vendor*], of the first part; C. B. of &c., widow, [*a party consenting to the purchase*], of the second part; and E. F., of &c., and G. H., of &c., [*trustees of the settlement*], of the third part: WHEREAS, by indentures of lease and release, bearing date respectively the 5th and 6th days of February, 1837, the release being made, or expressed to be made, between the said C. B., of the first part; the said A. B., of the second part; E. B., (then E. C., spinster, and now the wife of the said A. B.), of the third part; H. C., of the fourth part; the said E. F. and G. H., of the fifth part; H. W. and H. H., of the sixth part; and G. D. and S. H., of the seventh part; (being the settlement made previously to, and in consideration of, the marriage then intended, and shortly after had and solemnised between the said A. B. and E. B.); the manors, messuages, lands, and other here-

ditaments therein particularly mentioned, were conveyed, assured, and limited (*a*), from and after the solemnisation of the said marriage, to the use of the said H. W. and H. H., their executors, administrators, and assigns, for the term of ninety-nine years, upon trust for securing to the said E. B., during the joint lives of the said A. B. and E. B., an annual sum of £——, for her separate use, and from and after the expiration, or other sooner determination of the said term, and in the meantime subject to the said term, and to the trusts thereof, to the use of the said E. B. and her assigns, during the joint lives of herself and the said A. B., without impeachment of waste, with remainder to the use of the said E. F. and G. H., and their heirs, during the joint lives of the said C. B. and A. B., in trust

CONVEYANCE TO USES OF A SETTLEMENT.

Recites the settlement.

(*a*) When an estate is intended to be conveyed to the uses of a settlement, or will, it is usual to set forth briefly the limitations, powers, and provisoes of the instrument; but this is not strictly necessary; for it is sufficient to identify the settlement, by stating the date and parties. The recital will then run, that the hereditaments

"were conveyed, assured, and limited to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations in the said indenture of release declared, expressed, and contained of and concerning the same."

But this method has the inconvenience of not shewing who is the tenant for life consenting to the sale, nor why the donees of the power are intrusted with their authority. And if we state the limitations to the tenant for life, and the trustees to preserve contingent remainders, there is some difficulty in referring with accuracy to the subsequent limitations and powers. If, however, this course be followed, perhaps the best way is, to state the limitations, as far as circumstances require, and then to add—

"with divers remainders over; and in the said indenture of release were contained divers powers, provisoes, and declarations, including a power for [*the power of sale and purchase*]."

With respect to the order of the recitals, some observations will be found ante, page 242, note (*a*); and on the subject of recitals of settlements generally, see ante, page 222, note (*c*).

CONVEYANCE TO USES OF A SETTLEMENT.

for the said C. B. and her assigns, and to preserve the contingent remainders, with remainder, after the decease of the said A. B., (whether he should happen to survive the said C. B., or not), to the use and intent that, in case the said E. B. should happen to survive the said A. B., the said E. B. and her assigns should receive, during her life, a clear yearly rent-charge or annual sum of £500, to be issuing and payable out of the said manors and hereditaments comprised in and limited by the said indenture of release; and should, after the decease of the said A. B., so long as she should remain his widow, also receive a further clear yearly rent-charge or annual sum of £500, to be issuing and payable as aforesaid; and to the further use and intent, that, in case the said E. B. should happen to survive the said A. B., the said E. B. and her assigns should, after the decease of the survivor of them the said A. B. and C. B., receive, during her life, a further clear yearly rent-charge or annual sum of £500, to be issuing and payable as aforesaid, and should, after the decease of the survivor of them the said A. B. and E. B., so long as she should remain widow of the said A. B., receive a further clear yearly rent-charge of £500, to be issuing and payable as aforesaid, the said yearly rent-charges or annual sums of £500, £500, £500, and £500 respectively, to be payable in such manner, and to be attended with such powers and remedies for recovering and compelling payment thereof when in arrear, by distress and entry upon, and detention of the possession, and perception of the rents and profits of, the said manors and other hereditaments comprised in and limited by the said indenture of release, as in the same indenture are mentioned, and subject to the said yearly rent-charges or annual sums of £500, £500, £500, and £500, and to the powers and remedies for enforcing payment of the same respectively, to the use of the said G. D. and S. H., their executors, administrators, and assigns, for the term of five hundred years, to commence from the day of the decease of the said A. B., without impeachment of waste, upon the trusts in the said indenture of release mentioned for further securing the said yearly rent-charges or annual sums of

£500, £500, £500, and £500 respectively; and after the decease of the survivor of the said A. B. and E. B., and whether the said C. B. should be living or not, upon trust to raise for the portions of the children of the said marriage, (except an eldest or only son), the sums therein mentioned, namely, the sum of £——, if one child, and, if two or more children, the sum of £——, to be vested and payable in such manner, and with such powers of appointment, and provisions for the maintenance, education, and advancement of such children as are in the said indenture of release mentioned, with a proviso for cesser, in the events therein mentioned, of the said term of five hundred years; and from and after the expiration or other sooner determination of the said term, and in the meantime subject thereto, and to the trusts thereof, to the use of the said C. B. and her assigns, for her life, without impeachment of waste, with remainder to the use of the said E. F. and G. H. and their heirs, during the life of the said C. B., in trust for her and her assigns, and to preserve the contingent remainders, with remainder to the use of the said A. B. and his assigns, for his life, without impeachment of waste, with remainder to the use of the said E. F. and G. H. and their heirs, during the life of the said A. B., in trust for him and his assigns, and to preserve the contingent remainders, with remainder to the use of the first and every other son of the body of the said A. B., on the body of the said E. B. to be begotten, severally and successively, according to their respective seniorities, in tail male, with remainder to the use of the first and every other son of the body of the said A. B., on the body of the said E. B. to be begotten, severally and successively, according to their respective seniorities, in tail general, with remainder to the use of all and every the daughters of the said A. B. and E. B., as tenants in common in tail general, with cross remainders between them in tail general, with remainder to the use of the said A. B., his heirs and assigns: AND in the said indenture of release was reserved a power to the said A. B., to charge the said manors and other hereditaments with any sum or sums of money not exceeding £5,000, and interest; and to

CONVEYANCE TO USES OF A SETTLEMENT.

Powers of the settlement.

CONVEYANCE TO USES OF A SETTLEMENT.

raise the same as therein mentioned, and to limit such rent-charge or rent-charges as therein mentioned, to any wife, or wives, with whom he might intermarry, after the death of the said E. B., and to charge such sum or sums of money by way of portions, for the children of any such future marriage as therein mentioned, and also such power of leasing as is therein contained: AND by the said indenture of release, powers of sale and exchange, and of partition, were given to the said E. F. and G. H., and the survivor of them, and the executors or administrators of such survivor, to be exercised in manner therein mentioned, and at the request and by the direction of the person or persons therein mentioned (*b*): AND IT WAS, by the said indenture of release, also provided, that when all, or any part or parcel, parts or parcels of the said manors and hereditaments thereby made saleable as aforesaid, should be sold, in pursuance of the said power, for a valuable consideration in money; and also, when any sum or sums of money should be received for equality of exchange or partition, in pursuance of the said powers thereinbefore contained, then they the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, should, with all convenient speed, (with the consent of the said C. B., during her life, and after her decease, with the consent of the person or persons therein mentioned, to be testified by writing under her, his, or their hand, or respective hands), lay out and invest all and every the sum and sums of money which should arise by such sale or sales, and be paid for equality of exchange or partition as aforesaid, in the purchase of other manors, messuages, lands, or hereditaments in possession, to be situate, being, or arising somewhere in England or Wales, of a clear and indefeasible

Power of sale and exchange.

Money arising from sales to be laid out in purchase of land.

(*b*) As the intention in the present deed is to effect a purchase, it is not necessary to go into the particulars of the sale, by which the money to be now laid out was raised. It is enough to shew, that there was a power of sale, and that the trustees sold some land, and received the purchase-money; the power to invest that purchase-money must be fully set forth, as in the text.

CONVEYANCE TO USES OF A SETTLEMENT.

estate of inheritance in fee simple, and as well the hereditaments so to be purchased, as all and every the manors and hereditaments so to be received in exchange or on partition as thereinbefore mentioned, should be forthwith settled, conveyed, and assured for and upon such uses, trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, conditions, and agreements as were in and by the said indenture of release limited, expressed, declared, and contained of and concerning the manors, messuages, and other hereditaments therein comprised, or as near thereto as the deaths of parties, and other contingencies, or the circumstances of the case would then permit: AND WHEREAS the hereditaments hereinafter particularly mentioned, and intended to be hereby appointed and released, were purchased by the said A. B., at the price of £700, and were, by indentures of lease and release, bearing date respectively the 14th and 15th days of April, 1837, the release being made or expressed to be made between [*parties*], conveyed and assured [*to uses to bar dower in favour of A. B.; see mode of reciting, ante, Precedent XVII. p. 210*]: AND WHEREAS, by an indenture, bearing date the —— day of ——, 1837, and made or expressed to be made between the said E. F. and G. H., of the first part; the said C. B. and A. B., of the second part; and the —— Railway Company, of the third part; in consideration of the sum of £593, to them paid by the said company, the said E. F. and G. H., at the request and by the direction of the said C. B., (testified as therein mentioned), in pursuance of the said power of sale to them given by the said indenture of the 6th day of February, 1837, did limit and appoint, direct, and declare, that the pieces or parcels of land therein mentioned, situate in the parish of ——, in the county of ——, containing ——, or thereabouts, and being part of the hereditaments comprised in the said indentures of the 5th and 6th days of February, 1837, should thenceforth be and remain to the use of the said —— Railway Company, their successors and assigns for ever: AND WHEREAS the said E. F. and G. H., as trustees of the said indenture of the 6th day of February, 1837, and in pursuance of the direction in that behalf therein contained,

Recital of conveyances to uses in favour of A. B. of lands purchased;

—of sale by the trustees to a Railway Company;

—of contract of purchase.

CONVEYANCE TO USES OF A SETTLEMENT.

have, with the consent of the said C. B., (testified by this writing under her hand), contracted with the said A. B. for the purchase of the said hereditaments hereinafter particularly mentioned, and intended to be hereby appointed and released, and the inheritance thereof in fee simple in possession, free from incumbrances, at or for the price of £593; and it is intended that the said sum of £593, received from the said Railway Company, shall be the sum of money paid to the said A. B. as the said price of the said hereditaments (*c*): NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement and in consideration of the said sum of £593, at or immediately before the execution of these presents to the said A. B. paid by the said E. F. and G. H., with the consent of the said C. B., (testified by her being a party to and executing these presents), (the receipt of which said sum of £593, the said A. B. doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said E. F. and G. H., and each of them, their and each of their heirs, executors, and administrators for ever, by these presents), he the said A. B., with the consent of the said E. B., (testified as aforesaid), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to him the said A. B. for this purpose given by the said indenture of the 15th day of April, 1837, as hereinbefore is mentioned, and of all and every other power or authority in anywise enabling him in this behalf, doth, by this present deed, appoint that the said lands and hereditaments hereinafter particularly mentioned, and intended to be hereby released, shall henceforth go, remain, and be to the uses, upon the trusts, to and for the intents

Witnesseth.

Consideration.

Receipt.

Appointment to uses.

Tenant for life may deal with his trustees.

(*c*) It is now well settled, that a tenant for life, although a necessary party to the exercise of a power of sale or exchange, can take the settled estate under an exercise of the power, either by way of purchase or exchange; (*Howard* v. *Ducane*, 1 Turn. & Russ. 81; 2 Sugd. Powers, 517); and, of course, he may on the same principle sell to the trustees. In the case in the text, it is recited, that A. B. gave £700 for the property he sells to the trustees for £593, in order to shew on the face of the conveyance that the transaction is fair, as regards the settled estate.

and purposes, and with, under, and subject to the powers, provisoes, conditions, and agreements hereinafter limited, declared, and contained, or referred to (*d*), of and concerning the same: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement and for the considerations aforesaid, he the said A. B., with the consent of the said E. B., (testified as hereinbefore is mentioned), hath granted, allened, released, and confirmed, and by these presents doth grant, alien, release, and confirm unto the said E. F. and G. H., (in their actual possession, &c., *see Precedent XVI. p.* 198), and their heirs, [*parcels—general words*]: TO HAVE AND TO HOLD the said closes, pieces, or parcels of land and hereditaments, and all and singular other the premises hereby released or expressed, and intended so to be, unto the said E. F. and G. H. and their heirs, to the uses, upon the trusts, to and for the intents and purposes hereinafter limited, declared, and contained, or referred to, of and concerning the same: AND IT IS HEREBY agreed and declared, between and by the parties to these presents, that the appointment and the grant, release, and confirmation hereinbefore contained, shall respectively operate and enure to, for, and upon such uses, trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, conditions, and agreements as were in and by the said indenture of the 6th day of February, 1837, limited, expressed, declared, and contained of and concerning the said manors, messuages, and other hereditaments therein comprised, or as near thereto as the circumstances of the case will now admit, [but not so as to increase or multiply charges] (*e*): AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F. and G. H. and their heirs (*f*), by these presents,

CONVEYANCE TO USES OF A SETTLEMENT.

Witnesseth, secondly.

Grant, and release.

Parcels.

Habendum.

Declaration of uses by reference to settlement.

(*d*) The limitations, powers, &c., are only declared by reference to those of the settlement. Hence the employment of the words, "or referred to."

(*e*) The words in brackets are generally used in conveyances of this description, but they can hardly be deemed essential.

(*f*) The covenants are properly entered into with E. F. and G. H.,

CONVEYANCE TO USES OF A SETTLEMENT.

in manner following; (that is to say), [*that the power exercised by A. B. was well created, and is in force—for right to appoint and convey—for quiet enjoyment—free from incumbrances—and for further assurance; see Precedent XVII. p.* 216]. IN WITNESS &c.

XXX.

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

CONVEYANCE *by a* VENDOR *to* TRUSTEES *upon Trust, to carry into Effect an existing* CONTRACT *for* SALE, *with Power to* VARY *it, or to* RESCIND *it and* RESELL *the Estate.*

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., and C. D., of &c. [*trustees for the vendor*], of the first part; G. H., of &c. [*vendor*], of the second part; E. F., of &c. [*releasee*], of the third part; and the said A. B. and C. D., of the fourth part: WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made, or expressed to be made between [*parties*], the messuage or tenement, farm, lands, and hereditaments hereinafter particularly described, and intended to be hereby released, were conveyed and assured to the use of the said A. B. and C. D., their heirs and assigns, in trust for the said G. H., his heirs and assigns: AND WHEREAS the said G. H. hath contracted and agreed with M. N., of &c., for the absolute sale to him of the said messuage or tenement, farm, lands, and other hereditaments, and the inheritance thereof in fee

Recital of conveyance to trustees of vendor;

—of vendor having contracted to sell.

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as the releasees to uses; the covenants will thus run with the land, for the benefit of all the persons who take under the limitations of the settlement, if the appointment should happen to be inoperative. (See ante, p. 232, note (*o*)).

simple in possession, free from incumbrances, at or for the price or sum of £——, the timber, upon the same premises, to be taken by the purchaser at a valuation: AND WHEREAS the said G. H. having occasion to be absent from England, is desirous that the said messuage or tenement, farm, lands, and hereditaments hereinafter particularly described, and intended to be hereby released, should be vested in the said A. B. and C. D., upon and for the trusts, intents, and purposes hereinafter declared and contained: AND WHEREAS, for better effectuating his said desire, the said G. H. hath agreed to enter into such covenants as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said desire, and in consideration of the premises, they the said A. B. and C. D., at the request and by the direction of the said G. H., (testified by his being a party to and executing these presents), have, and each of them hath released, and by these presents do, and each of them doth release, and the said G. H. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said E. F., (in his actual possession now being, by virtue of a bargain and sale to him thereof made by the said A. B., C. D., and G. H., in consideration of five shillings a-piece, by indenture &c., [*see Precedent XVI.* p. 198]), and to his heirs, ALL &c., [*parcels—general words*]: TO HAVE AND TO HOLD the said messuage or tenement, farm, lands, and hereditaments, and all and singular other the premises hereinbefore released or expressed, and intended so to be, unto the said E. F. and his heirs, TO THE USE of the said A. B. and C. D., their heirs and assigns, nevertheless, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared of and concerning the same; (that is to say), UPON TRUST, that they the said A. B. and C. D., and the survivor of them, and the heirs of such survivor, do and shall, as soon as conveniently may be, and when and as they or he shall think fit, and without any further consent or concurrence of the said G. H., or of any person

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

—of vendor's desire to convey to the trustees, upon trusts to be declared;

—and agreement to enter into covenants.

Witnesseth.

Conveyance by vendor and his trustees.

Habendum.

To use of trustees.

Declaration of trust—to carry into effect the contract;

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

or persons claiming through or under him, complete the said contract so entered into with the said M. N., for the sale of the said messuage or tenement, farm, lands, and hereditaments hereinbefore released or expressed or intended so to be, with the timber thereon as aforesaid, or do and shall, at their or his discretion, alter, vary, rescind, or abandon the said contract, without being in anywise answerable for any loss which may happen thereby; and in case the said contract shall not be rescinded or abandoned as aforesaid, do and shall, in pursuance of the said contract, (either with or without any such alteration or variations as aforesaid), well and effectually convey and assure the said messuage, tenement, farm, lands, and hereditaments hereby released, or expressed or intended so to be, unto the said M. N., his heirs and assigns, or unto such uses and in such manner as he or they shall direct; but in case the said contract shall be so rescinded or abandoned as aforesaid, then, upon trust, that they the said A. B. and C. D., or the survivor of them, or the heirs of such survivor, do and shall, as soon as conveniently may be after such contract shall be so abandoned and rescinded, absolutely sell and dispose of the said messuage or tenement, farm, lands, and hereditaments hereinbefore released, or expressed and intended so to be, either entirely and altogether, or in parcels (*a*), and either by public auction or private contract (*b*), for such price or prices, or sum or sums of money

—or to vary or rescind it;

—and to convey accordingly;

and if contract be rescinded, to re-sell.

(*a*) The power to sell in lots is always given to trustees expressly; but, even in the absence of an express power to that effect, there seems to be nothing to prevent trustees from selling in lots, if they think a sale in that manner will be most advantageous. See *Ord* v. *Noel*, 5 Madd. 438, where, however, the terms of the trust do not appear. Assignees of a bankrupt may sell in lots. (*Ex parte Lewis*, 1 Glyn & Jam. 69).

Manner of sale by trustees.

(*b*) If the manner of sale is not prescribed by the trust, it is proper for the trustees to sell by public auction, because a sale in that way is evidence of the market price of the estate, (3 Madd. 232; 5 Madd. 440), and relieves the trustees from the burden of shewing that they got a fair price for it. But on a sale by auction, it is the duty of the trustees to see that due notice and advertisement of the sale is given,

as the said A. B. and C. D., or the survivor of them, or the heirs of such survivor (*c*), shall think reasonable, and with power to buy in the said premises, or any part thereof, at any sale or sales by auction, and to rescind, abandon, or vary any contract for sale, and to resell the premises which shall be so bought in or the contract for the sale of which shall be so rescinded or abandoned as aforesaid, without being in anywise answerable for any loss which may happen thereby respectively (*d*); and also with full

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

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so as to insure the usual chance of competition; (*Pechel* v. *Fowler*, 2 Anst. 549; *Anon.* 6 Mad. 10; *Ex parte Montgomery*, 1 Glyn & Jam. 338); and, in some cases, an injunction will be granted against them if they are proceeding to sell without due notice. See the above cases.

It is usual to give trustees an express power to sell by private contract; but the effect of the additional power, it is presumed, is only to exempt them from the necessity of proving that they have made an advantageous sale, and to facilitate the obtaining of a purchaser; inasmuch as they may, without a special power, sell by private contract, if they choose to incur the liability, and can find a purchaser who will do so likewise. Assignees of a bankrupt may, if they please, sell by private contract. (*Ex parte Dunman*, 2 Rose, 66).

Trustees for sale may, if they think fit, sell by an agent, if such be the usual course of business; (*Ord* v. *Noel*, 5 Madd. 438; *Ex parte Belchier*, Amb. 218); but they will be held responsible if the agent be improperly selected. (*Ord* v. *Noel*, ubi supra; *In the matter of the Earl of Litchfield*, 1 Atk. 87; *Hardwick* v. *Mynd*, 1 Anst. 109).

It is common to add "to any person or persons willing to become the purchaser or purchasers thereof;" but the words are nugatory, for a sale could not be made to a person who was not willing, and may be made to any person who is willing to become a purchaser.

(*c*) It is the practice to add "their or his assigns," or to insert before the words "of such survivor" the words "or assigns." If either is to be used, the first is the correct expression, as the latter does not extend to the assigns of both trustees, or of the heirs of the survivor; but the best way is to omit all mention of assigns in the general clauses of the deed, and to leave their powers and estates to be defined by the trustee clauses, from which they derive their effective powers.

(*d*) If trustees or the assignees of a bankrupt buy in property at a sale by auction, and the property is afterwards resold at a less price, they will be compelled to make good the deficiency. (*Taylor* v. *Tab-*

Trustees buying in property.

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

power to insert any special or other clauses, or stipulations, in any contract for or conditions of sale, and either as to title or otherwise, as they the said A. B. and C. D., or the survivor of them, or the heirs of such survivor, shall think fit (*e*), and to take such steps for enforcing the said present contract, either with or without such alterations or restrictions as aforesaid, or any other sale or contract as he or they shall think fit, and do and shall enter into all such other arrangements as the said A. B. and C. D., or the survivor of them, or the heirs of such survivor shall, in their or his discretion, think fit, in relation to any sale or sales of the said premises, or of any part thereof; and do and shall receive the purchase-money to arise from any sale or sales completed in pursuance of these presents, including the price of timber, and do and shall, out of such purchase-money, pay all the expenses attending such sale or sales as aforesaid, or otherwise incurred in the execution of any of the trusts or powers hereby declared, or herein contained, and do and shall hold all the residue of the same purchase-money in trust for the said G. H., his executors, administrators, and assigns; and also shall receive the rents and profits of the said messuage or tenement, farm, lands, and other hereditaments, or of the unsold part or parts thereof for the time being, in the meantime and until the same shall be sold; and do and shall, out of the same rents and profits, pay all the rates, taxes, expenses (*f*), repairs, and other outgoings, in respect of the premises, and do and shall pay the surplus of such rents and profits to the said G. H., his executors, administrators, and assigns: PRO-

Trusts of purchase-money;

—and of the rents and profits, until purchase be completed.

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rum, 6 Sim. 281; *Ex parte Lewis*, 1 Glyn & Jam. 69). See, however, *Ex parte Buxton*, Id. 355; and *Buxton* v. *Buxton*, 1 My. & Cra. 80; and *Ex parte Lacey*, 6 Ves. 625, 629.

(*e*) As to the power of trustees to sell subject to conditions of sale, see ante, page 95, note (*a*).

(*f*) If the property consist of houses or other property subject to damage by fire, it will be right to insert

"(including the expense of keeping the premises adequately insured against loss or damage by fire)."

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

VIDED ALWAYS, and it is hereby agreed and declared, between and by the parties to these presents, that the receipt or receipts in writing of the said A. B. and C. D., and the survivor of them, and the heirs of such survivor, or of the trustees or trustee for the time being acting in the execution of the trusts of these presents, for any sum or sums of money payable to them or him as the purchase-money of the said premises, or any of them, or otherwise, under or by virtue of these presents, or in the execution of the trusts hereof, shall be a sufficient and effectual discharge, or sufficient and effectual discharges for the same respectively, or so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged to be received, and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication or nonapplication, or be in anywise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received (*g*): PROVIDED ALWAYS, and it is hereby agreed and declared,

Power to trustees to give receipts.

(*g*) Although purchase-money may be payable to trustees, yet, in very many cases, equity will hold the purchaser bound to see that the money is applied according to the trust. (See a full discussion of the cases in 2 Sugd. V. & P. ch. xi. ss. 1, 2; and see the recent cases of *Braithwaite* v. *Britain*, 1 Keen, 206; *Pierce* v. *Scott*, 1 You. & Col. 257; *Shaw* v. *Borrer*, 1 Keen, 559; *Wood* v. *Harman*, 5 Madd. 368). The case of *Johnson* v. *Kennett*, cited 2 Sugd. V. & P. 39, and reported 6 Sim. 384, has been reversed by the Lord Chancellor. 3 My. & Ke. 624. (See, too, *Rogers* v. *Rogers*, 6 Sim. 364).

Trustees' power to give receipts.

Perhaps, it may fairly be deduced from the above authorities, that, generally, a purchaser is not bound to see to the application of his purchase-money, where there is a hand appointed to receive the money; but the doctrine cannot, with safety, be relied on in practice. The draftsman's rule is always to insert in his trust deeds a special clause, that the receipts of the trustees for the time being shall be discharges for the money payable to them as purchase-money, or otherwise, by virtue or in execution of the trust.

It is prudent to give effect to the receipts, not only of the trustees by name, and the survivor of them, and his representatives, but also to those of the trustees or trustee for the time being acting in the execution of the trusts. For, otherwise, difficulties may be made by some of the trustees disclaiming or declining to act. (See 2 Sugd.

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

between and by the parties to these presents, that if the said trustees hereinbefore named, or either of them, or any trustee or trustees to be appointed as hereinafter is mentioned, shall die or be absent from this kingdom more than six calendar months at any one time, or be desirous of being discharged of and from, or refuse or decline, or become incapable to act in the aforesaid trusts, before the same shall be fully executed, then and so often as the same shall happen, it shall be lawful for the surviving or continuing trustees or trustee for the time being, (and for this purpose, any trustee or trustees retiring from or declining to act in the aforesaid trusts shall, if willing to act in the exercise of this present power, be considered a continuing trustee or continuing trustees), or for the executors or administrators of the last surviving or continuing trustee for the time being, from time to time, to appoint any other person to be a trustee or trustees in the stead of the trustee or trustees so dying, or being absent from this kingdom, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that, upon every such appointment, the said trust estates, monies, and premises shall be assigned, transferred, or conveyed in such manner, and so that the same may become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case may require; and every such new trustee shall have the same powers as if he or they had been originally named a trustee in these presents: Provided also, and it is hereby further agreed and declared, between and by the parties to these presents, that the trustees or trustee for the time being of these presents shall not be answerable the one for the other of them, and by no means for involuntary losses; and also, that it shall be lawful for the said trustees or trustee for the time being to reimburse themselves or himself out of the monies which shall come to their or his hands, by virtue of the trusts aforesaid, all their costs and expenses to be

Power to appoint new trustees.

V. & P. 50, 51; and the cases of *Townson* v. *Tickell*, 3 B. & Ald. 31; *Stacey* v. *Elph*, 1 My. & Ke. 195; *Begbie* v. *Crook*, 2 Bing. N. C. 70).

incurred in or about the execution of the aforesaid trusts (*h*); [*Covenants by G. H.—that notwithstanding any act done by G. H., A. B., or C. D., or any of them &c., A. B. and C. D. are seised in fee, in trust for him—that A. B., C. D., and G. H. respectively, have right to convey—for quiet enjoyment—free from incumbrances—and for further assurance, see Precedent XVI. p.* 201]. IN WITNESS &c.

TRUST TO EFFECTUATE A CONTRACT FOR SALE.

XXXI.

GRANT *of an* ADVOWSON (*a*) *by* JOINT TENANTS.

GRANT OF ADVOWSON.

THIS INDENTURE, &c. BETWEEN A. B., of &c. and C. D., of &c. [*vendors*], of the one part; and E. F., of &c. [*purchaser*], of the other part: WHEREAS, by an indenture,

Parties.

Recital of con-

(*h*) The powers and provisoes here given for the appointment of new trustees, and for the indemnity and reimbursement of the trustees, are of the shortest possible description. The longer forms, which are in ordinary use, with the remarks on their frame and application, will be found in those parts of this work which are devoted to precedents of wills and settlements.

Trustee clauses.

It may, however, be noticed, that the short forms given in the text are probably, in common cases, quite as efficient as the longer ones generally employed. The events in which new trustees may be appointed are specified in the short forms, quite as clearly and fully as in the others, and the new trustees are invested with the same powers as the old trustees. The clauses abridged are those which direct the manner of appointment and conveyance, and relate to indemnity and reimbursement; and which, in their extended form, are either concerned with things not essential, or with matters which the law would imply, at least, when aided by the expression of intention contained in the short forms. The short forms will be found extremely useful in cases in which it is desirable to save expense, and may be very safely relied on.

(*a*) See the previous observations in regard to purchases of advowsons, ante, Precedent IV. p. 113, notes (*a*) and (*c*); and see *Alston* v. *Atlay*, 2 Nev. & Per. 292, and the authorities and cases there cited.

GRANT OF ADVOWSON.

bearing date the —— day of ——, and made or expressed to be made between [*parties*], the advowson of the rectory and parish church of ——, in the county of ——, and diocese of ——, was conveyed and assured to the use of the said A. B. and C. D., their heirs and assigns: AND WHEREAS the said E. F. hath contracted and agreed with the said A. B. and C. D. for the absolute purchase of the said advowson, and the inheritance thereof, in fee simple in possession, free from incumbrances, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, at or immediately before the sealing and delivery of these presents to the said A. B. and C. D., paid by the said E. F., (the receipt of which said sum of £——, they the said A. B. and C. D. do hereby admit and acknowledge, and of and from the same and every part thereof do, and each of them doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns, for ever, by these presents: They the said A. B. and C. D. have, and each of them hath granted, aliened, and confirmed, and by these presents do and each of them doth grant, alien, and confirm (*b*) unto the said E. F., his heirs and assigns, ALL THAT the advowson [donation, nomination, presentation, free disposition, and right of patronage and presentation (*c*)], of and to the said rectory and parish church of —— aforesaid, AND the reversion &c., AND all the estate &c.: TO HAVE

veyance to vendors, as joint tenants;

—of contract for sale.

Witnesseth.

Consideration.

Receipt.

Grant.

Parcels.

Habendum to

(*b*) "Grant" is the appropriate operative word; the others are mere customary additions.

(*c*) These are the usual words of description in grants of advowsons, but there cannot be much doubt, that the whole of those within the brackets may be safely dispensed with. They are, however, to be found in the oldest forms of grants of advowsons. (See West's Symb. s. 332, 597).

Of course, no lease for a year is necessary; for the advowson, being an incorporeal hereditament, passes by grant. A wife is dowable of an advowson; (Co. Lit. 379. a.; 3 Cru. Dig. 7); and, therefore, it may be sometimes necessary to convey the advowson to uses to bar dower. (See Precedent XVII. p. 205, for the declaration of uses, and the required alterations in the covenants).

AND TO HOLD the said advowson, donation, nomination, presentation, free disposition, and right of patronage and presentation, and all and singular other the premises hereinbefore granted, or expressed and intended so to be, unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns for ever: AND THEY the said A. B. and C. D. do hereby, for themselves, their heirs, executors, and administrators, covenant (*d*) with the said E. F., his heirs and assigns, in

GRANT OF ADVOWSON.

purchaser in fee.

(*d*) The form of covenants for joint tenants is not well settled, either by judicial decision, or the practice of conveyancers. In the Precedent in the text, the joint tenants are made to covenant jointly for themselves, their heirs, executors, and administrators, and without any restriction as to their respective acts and deeds; but it is the opinion of many conveyancers, that joint tenants should covenant severally, each only for his own heirs, executors, and administrators, and his and their own acts and deeds. (See a form of such a covenant, ante, Vol. II. p. 687, Art. IX. and the following form:—

Covenants by joint tenants.

"And each of them the said A. B. and C. D., so far as relates to his own acts and deeds, and the acts and deeds of his heirs, executors, and administrators, doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns, in manner following, &c."

In this case, the words "or either of them," and similar words in the covenants will be exchanged for "respectively," "respective," &c., as the case may require.

Perhaps this last form of covenant is the most reasonable, as it is hard to make each joint tenant liable for the acts of his fellow; but, in the absence of a settled rule on the subject, the best course for a purchaser's counsel is to make the covenants joint, as that is the form most advantageous for a purchaser.

Covenants by tenants in common.

The rule with regard to covenants by tenants in common is equally involved in difficulty. They covenant severally, and their covenants are generally restricted "so far as relates to the undivided share of him the said ——, of and in the said hereditaments, and the acts and deeds of himself, his heirs, executors, and administrators;" but some practitioners frame the covenants without this restriction, but with a proviso at the end, that no one of the tenants in common shall be liable for damages on his covenants to an amount exceeding the value of his share of the estate. It may be doubted, however, whether this plan is correct, for the true principle seems to be, that such covenants should be entered into by each of the tenants in common, as he would

GRANT OF ADVOWSON.

manner following; (that is to say), that, for and notwithstanding any act, deed, matter, or thing whatsoever, by them the said A. B. and C. D., or either of them, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, they the said A. B. and C. D., at the time of the sealing and delivery of these presents, are lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to, the said advowson and premises hereinbefore granted, or expressed and intended so to be, and every part thereof, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee simple in possession, without &c., [*see page* 202]: AND THAT, for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, they the said A. B. and C. D. now have in themselves good right, full power, and absolute authority to grant, alien, and confirm the said advowson and premises hereinbefore granted, aliened, and confirmed, or expressed and intended so to be, unto and to the use of the said E. F., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND THAT it shall be lawful for the said E. F., his heirs and assigns, from time to time, and at all times hereafter, to present to the said rectory, or parish church of ——, afore-

—for title;

—for right to grant;

—for quiet enjoyment;

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enter into if he sold his undivided share separately. In that case, his covenants would extend to the acts only of himself, his heirs, executors, and administrators, and to the share he conveys; and, therefore, when he joins with his co-tenants in selling the entirety, his covenants should be similarly restricted, and quite independent of the question of value. If it were not for the expense, separate sets of covenants should be entered into by each tenant in common; and that being impracticable, the one set used should be so worded as to have the same effect.

The same principle cannot be so well applied to the covenants of joint tenants, although each joint tenant, if he sold his share separately, and so severed the joint tenancy, might, perhaps, object to covenant in any other manner than a tenant in common would do, under similar circumstances.

However, as above noticed, the whole question is in an unsatisfactory condition; some further observations on it will be found in the first Volume, in the chapter on Covenants.

GRANT OF ADVOWSON.

said, when and so often as the same shall become vacant by any means whatsoever, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand, whatsoever, of or by the said A. B. and C. D., or either of them, their or either of their heirs, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for them or any of them: AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, and released, or otherwise by them the said A. B. and C. D., or one of them, their or one of their heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B. and C. D., or either of them, their or either of their heirs, or any person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them or any of them: AND FURTHER, THAT they the said A. B. and C. D., and each of them, their and each of their heirs, and all and every other person or persons, having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said advowson and premises hereinbefore granted, or expressed and intended so to be, or any part thereof, from, under, or in trust for them, the said A. B. and C. D., or either of them, or their or either of their heirs, shall and will &c. [*see page* 204]. IN WITNESS &c.

—free from incumbrances;

—for further assurance.

XXXII.

GRANT OF NEXT PRESENTATION.

GRANT *by a* TENANT *for* LIFE (*a*), *of the* NEXT PRESENTATION *to a* RECTORY.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*vendor*], of the one part; and C. D., of &c. [*purchaser*], of the other part;

Recital of vendor's seisin;

WHEREAS the said A. B. is seised of the advowson and right of presentation of and to the parsonage, rectory, and parish church of ——, in the county of ——, for the term of his life as tenant, by the curtesy of England (*b*):

—of contract for sale;

AND WHEREAS the said C. D. hath contracted and agreed with the said A. B., for the absolute purchase of the first and next turn or right of presentation in and to the said parsonage, rectory, and parish church, if the same shall happen to become vacant during the life of the said A. B., at or for the price or sum of £——:

—of agreement for absolute covenants.

AND WHEREAS, upon the treaty for the said purchase, it was agreed that the said A. B. should enter into such absolute covenants for title as are hereinafter contained (*c*):

Witnesseth.

NOW

Sale of next presentation, when vendor is absolutely entitled;

(*a*) There will be no difficulty in adapting this Precedent to the case in which the grant of the next presentation is made by a person absolutely entitled; it will only be necessary to omit the words referring to the contingency of a vacancy falling during the life of the tenant for life.

—by tenant for life.

A contract by a tenant for life for a sale of a next presentation with a covenant, that, if a vacancy do not happen in his lifetime, he, his heirs, executors, or administrators will repay the money, is a valid contract and covenant. (*Dymoke* v. *Hobart*, 1 Bro. P. C. 108). See further, ante, Precedent IV. p. 113, note (*a*).

Curtesy may be of an advowson.

(*b*) A husband will be tenant by the curtesy of an advowson, even though the church be not void during the coverture. (1 Inst. 29 a; 3 Cru. Dig. tit. xxi. ch. 1, ss. 26—28).

Absolute covenants for title.

(*c*) In the case in the text, the vendor did not shew the title to the advowson, and the purchase was made in reliance on his covenants,

GRANT OF NEXT PRESENTATION.

THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the sum of £——, at or immediately before the sealing and delivery of these presents to the said A. B. paid by the said C. D., (the receipt, &c. [*see Precedent XVI. page* 194]), he the said A. B. hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said C. D., his executors, administrators, and assigns, ALL THAT the turn or right of presentation, donation, collation, nomination, and free disposition of and to the said parsonage, rectory, and parish church, which, if the said parsonage, rectory, and parish church shall become vacant during the life of the said A. B., shall first or next happen after the sealing and delivery of these presents: TO HAVE AND TO HOLD the said first or next turn or right of presentation so happening, during the life of the said A. B., unto the said C. D., his executors, administrators, and assigns, for his and their own use (*d*): AND THE SAID A. B. doth hereby, for himself,

Consideration.

Receipt.

Grant.

Parcels.

Habendum.

Absolute covenants by vendor;

which, of course, were to be absolute. Where it is intended that the covenants shall be absolute, that intention should always be stated in the recital, to prevent the setting up at any future time of an allegation, that the departure from the usual practice was made by mistake, and contrary to the intention of the vendor. (*Coldcot* v. *Hide*, 1 Cha. Ca. 15; 2 Freem. 173; *Fielder* v. *Studley*, Finch, 90; *Browning* v. *Wright*, 2 Bos. & Pul. 26; *Hesse* v. *Stevenson*, 3 Bos. & Pul. 575; 1 Sugd. V. & P. 161; 2 Id. 102. See, too, *Stannard* v. *Forbes*, 1 Nev. & Per. 633).

Next presentation a chattel.

(*d*) The next presentation to a church, when severed from the advowson, is a chattel—a chattel real till the vacancy happens, and a chattel personal afterwards. Of course, the habendum should be to the executors and administrators. (1 Williams's Law of Executors, 420, 421). And if an advowson presentative is vested in any person in his natural capacity, either in fee or for life, and the church become void, and the owner dies after such avoidance, without making any appointment—the right to appoint to the vacant turn belongs to the executor and not to the heir, or to the next owner of the advowson. (8 Bing. 557, 558; 1 Willms. Law of Executors, ubi supra). And the law is the same if the advowson is vested in the owner in a politic capacity. (*Mirehouse* v. *Rennell*, (in the House of Lords), 8 Bing. 490; S. C. below, nom. *Rennell* v. *Bishop of Lincoln*, 3 Bing.

GRANT OF NEXT PRESENTATION.

his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, that he the said A. B., at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said advowson and right of presentation of and to the said parsonage, rectory, and parish church aforesaid, for a good, sure, perfect, absolute, and indefeasible estate, for his life, in possession as tenant by the curtesy of England, without &c., [*see page 202*]: AND THAT he the said A. B. now hath in himself good right, full power, and absolute authority, to give, grant, and confirm the said first or next turn or right of presentation so happening during the life of the said A. B.,

—for title;

—for right to grant;

223; 7 B. & C. 113). And see the authorities cited in the above case, particularly in the opinion of Tindal, C. J., 8 Bing. 556. But where a man was seised of an advowson donative, and the church became vacant, and he afterwards died, it was held that his heir and not his executor was entitled to present. (*Repington* v. *Tamworth School*, 2 Wils. 150). But the authority of this case is very doubtful. (See the remarks of the Judges in *Rennell* v. *Bishop of Lincoln* and *Mirehouse* v. *Rennell*, ubi supra; see, too, 1 Willms. Law of Executors, 422, note (*o*)).

If an incumbent of a benefice, with cure of souls, although of a less annual value than £8 in the king's books, be instituted to another benefice, the first benefice is absolutely void as to the patron, except for the purpose of lapse; and, therefore, where the patron of such a benefice, the incumbent of which had been instituted to another benefice, sold the advowson, it was held, that the right to the presentation did not pass with the advowson. (*Alston* v. *Atlay*, 2 Nev. & Per. 492). But the incumbent of a benefice so avoided, may sue for tithes till sentence of deprivation, or until another clerk is presented. (*S. C.*; see, too, *Halton* v. *Cove*, 1 B. & Ad. 538; *Apperley* v. *Bishop of Hereford*, 9 Bing. 681; *Betham* v. *Gregg*, 10 Bing. 352).

If a church become void during the life of a husband who is tenant by the curtesy, and he die before the church is filled, the executor of the husband shall have the turn, and not the heir of the wife. (Wats. C. L. p. 71, 4th edit.). So, if a husband be seised of an advowson in right of his wife, and the church become void during the coverture, the husband is entitled to present, even if the wife die before the presentation, and there be no issue of the marriage. But if the wife survive the husband, or if the vacancy fell before the coverture, she or her executors shall present. (Co. Lit. 351. a.; Wats. C. L. 71, 72).

and hereinbefore given, granted, and confirmed, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND THAT it shall be lawful for the said C. D., his executors, administrators, and assigns, to present to the said parsonage, rectory, and parish church, when and if the same shall first or next become vacant during the life of the said A. B., by any means whatsoever, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by the said A. B., his executors or administrators, or any other person or persons whomsoever, any estate, right, title, or interest having, or lawfully or equitably claiming, or to have, or lawfully or equitably claim in or to the said advowson or right of presentation; AND THAT free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever: AND FURTHER, THAT he the said A. B., his executors and administrators, and all and every other person and persons whomsoever, having, or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or interest, of, in, or to the said first or next turn or right of presentation so happening during the life of the said A. B. as aforesaid, shall and will, from time to time, and at all times hereafter, upon the request of the said C. D., his executors, administrators, or assigns, but at the costs and charges of the said A. B. (*e*), his executors or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, gifts,

GRANT OF NEXT PRESENTATION.

—for quiet enjoyment;

—free from incumbrances;

—for further assurance.

(*e*) The costs of further assurances, (the covenants being absolute), are here thrown upon the vendor, as in the case of a mortgage upon the mortgagor. And so it should be, because the purchaser, not seeing the title, can only frame his conveyance upon the statement of the vendor, and errors ought therefore to be remedied at the expense of the vendor.

Expense of further assurance when the title is not shewn.

GRANT OF NEXT PRESENTATION.

grants, confirmations, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, confirming, and assuring the said first or next turn or right of presentation so happening during the life of the said A. B. as aforesaid, unto the said C. D., his executors, administrators, and assigns, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required. IN WITNESS &c.

XXXIII.

COVENANT TO SURRENDER COPYHOLDS.

COVENANT *to* SURRENDER COPYHOLDS, *with Covenants for Title, and with* VARIATIONS, *where the* SURRENDER PRECEDES *the Covenants for Title* (*a*).

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*vendor*], of the one part, and C. D., of &c. [*purchaser*],

---

Forms of the assurances of copyholds.

(*a*) The legal estate in copyhold hereditaments can be conveyed only by the customary mode of assurance, generally by surrender, into the hands of the lord, or of his steward, or other customary deputy, and the consequent admittance of the purchaser. The record of this customary conveyance is preserved on the court-rolls, and is evidenced by the stamped copy of the entry on the rolls. See the cases cited ante, page 157, note.

But as no covenants for title can be entered into on the court-rolls, it is usual, at the present day, to have a separate deed prepared, for the purpose of containing the usual covenants. If the deed precede the surrender, it assumes the form of the precedent in the text, viz. a covenant by the vendor to surrender to the purchaser, followed by the usual covenants for title; and this is the more common form. But if the surrender precede the deed, the words in the text within brackets must be omitted, and the variations in the notes introduced at the places referred to.

Purchase-money not to be paid till surrender.

In case the former method of conveyance is resorted to, and the covenant precede the surrender, the purchaser must not pay his purchase-money until the actual surrender has been made; for, if after

of the other part: WHEREAS the said A. B. [hath] con- COVENANT TO SURRENDER COPYHOLDS.

the execution of the deed of covenant, but before the surrender, another purchaser, for valuable consideration, and without notice of the covenant, should take a surrender to himself and be admitted, he would be entitled to hold the estate against those claiming under the covenant; for he would have an equal equity with them, and be the owner of the legal estate. (*Oxwick* v. *Plumer*, 5 Bac. Abr. 43; see, too, *Whitbread* v. *Jordan*, 1 You. & Col. 303; *Plumbe* v. *Fluitt*, 2 Anst. 432). Recital of contract for sale.

It is, probably, from the circumstance that copyholds are frequently sold together with freeholds, at an entire price for the whole, that the practice of taking the covenant to surrender has arisen; the purchase-money is paid on the execution of the deed of conveyance of the freeholds; and, in the same deed, is inserted the covenant to surrender the copyholds. The apportionment of price is only made for the purpose of the stamp duty, and without any regard to the real comparative value of the freeholds and copyholds. But, it may be doubted, whether the practice is correct, for, independently of the consideration, that the value or price of copyholds ought not to be paid until, by the surrender of the vendor, the legal title to admittance is vested in the purchaser; it is a very serious question, whether the covenants for title will run with the land if they are entered into before the surrender to the purchaser. In the case of *Riddell* v. *Riddell*, (7 Sim. 529), John Riddell, by an indenture, dated the 15th of July 1825, covenanted for valuable consideration to surrender to Robert Morris, his heirs and assigns, a piece of land, held by copy of the manor of Cheltenham, and entered into the usual covenants for title with Morris, his heirs and assigns. On the 16th of July, 1825, Riddell surrendered to Morris, in pursuance of the covenant. In November, 1825, Morris sold to Billings, and covenanted to surrender, and covenanted with Billings, his heirs and assigns, for title, as against his (Morris's) own acts, and the acts of persons claiming under him; shortly afterwards Morris surrendered to Billings, who was admitted, and then Morris became bankrupt. The widow of John Riddell afterwards established her right to freebench out of the lands aliened by her husband; (*Riddell* v. *Jenner*, 10 Bing. 29); and it then became a question, whether Billings could avail himself of Riddell's covenants with Morris, so as to obtain an indemnity for the dower. The master to whom the cause stood referred, reported that the indemnity made by the covenants was a subsisting charge, and capable of being enforced by Billings against the estate and effects of John Riddell. The report was objected to and the point argued; and the Vice-Chancellor (Sir L. Shadwell) decided in favour of the report. "Where," his Honor observed, "a deed containing a covenant to surrender copyholds and covenants for title is executed on Whether covenants for title, entered into before surrender, run with the land. *Riddell* v. *Riddell*.

COVENANT TO SURRENDER COPYHOLDS.

tracted and agreed with the said C. D. for the absolute

one day, and the surrender is made on a subsequent day, the whole, in my opinion, must be taken as one assurance; as in the case where a deed of feoffment is executed on one day, and the livery of seisin is not made until a subsequent day. If that be so, the covenants in question will run with the land, and the persons who are the owners of the land can enforce them. But if they do not run with the land, then they are covenants in gross, and Morris must be considered as holding them for the benefit of the parties who claim by assignment under him. For, it is evident, from the form of the transaction, that the intention of the parties was, that the original covenants should either run with the land, or, if not, that they should remain with Morris for the benefit of his assignees. In my opinion, therefore, the finding of the master is right, for the covenants are capable of being enforced against Riddell's estate by the purchasers from Morris, either in their own names or in the name of their vendor."

Remarks on *Riddell* v. *Riddell.*

It will be observed, that, in the view which the Vice-Chancellor took of the case, it was unnecessary for him to decide whether Riddell's covenants did or did not run with the land; one way or the other, in equity, Billings was entitled to the benefit of them. And, it does appear, that the doctrine laid down by his Honor, is open to much remark. It is not easy to see the analogy between the covenant and surrender and the feoffment and livery; for the covenant has no legal effect on the land, the surrender alone is the legal assurance; while the feoffment and livery are only different parts of the same legal assurance. Suppose a covenant to make feoffment with livery, and that, in the deed of covenant, are contained the covenants for title; it would not then be maintained that they would run with the land; and, yet, the covenant in one case, is as much part of the assurance as in the other. Then, again, the Vice-Chancellor says, that the *intention* of the parties was, that the covenants should run with the land, but it cannot readily be admitted that the *intention* of the parties is to govern a purely legal question. If the intention of the parties is to determine whether covenants shall run with the land, there are very few which would not be made to do so. There is no question here about the estate of the parties as there was in *Roach* v. *Wadham*, (6 East, 289); it is clear that the covenantee had no legal estate when the covenants were entered into, and that the question as to whether covenants run with the land is a legal question. (See *Whitton* v. *Peacock*, 2 Bing. N. C. 411; S. C. 3 My. & Ke. 325).

If the expression of opinion in *Riddell* v. *Riddell* is law, there is no objection to taking the covenants for title before the surrender; but as (it is submitted) the case cannot be relied on, the safer course, at present, is to make the surrender precede the deed of covenants, and to make the assurances bear even date with each other.

sale to him of the messuages, pieces, or parcels of land, and other hereditaments hereinafter (*b*) [particularly] mentioned, [and covenanted to be] (*c*) surrendered, with their appurtenances, and the inheritance thereof, in possession, according to the custom of the manor of which the same are holden, free from all incumbrances, except the rents, fines, heriots, suits and services therefore due and of right accustomed, at or for the price or sum of £—— (*d*): NOW THIS INDENTURE WITNESSETH, that, in (*e*) pursuance of the said agreement and in consideration of

COVENANT TO SURRENDER COPYHOLDS.

Witnesseth.

Consideration.

The legal assurances of copyholds, the surrenders, admittances, and other instruments, are usually prepared by the stewards of the manors, who are generally the only persons acquainted with the peculiarities of their respective manors. Precedents of these assurances may be found in the works of Watkins and Scriven on Copyholds; a form of memorandum of a surrender for barring an estate tail will be given in another part of this work.

Legal assurances of copyholds.

It is usual in the deed accompanying the surrender to connect the description of the property surrendered, or intended to be surrendered, with the description on the court rolls, by some reference of the kind in the text. But this is merely done for convenience, and is not to be adhered to, if such a course would disclose on the deed any estates or incumbrances which it is undesirable to shew.

Description of copyhold parcels.

(*b*) "described and"

(*c*) "to have been"

(*d*) "and upon the treaty for the said sale it was agreed, that the said A. B. should enter into such covenants as are hereinafter contained: AND WHEREAS, in pursuance of the said agreement, the said A. B., at a court baron and customary court, holden in and for the manor of ——, in the county of ——, surrendered into the hands of the lord of the said manor by his steward, and according to the custom of the said manor, ALL &c. [*parcels*], with their rights, easements, and appurtenances, to the use of the said C. D., his heirs and assigns, according to the custom of the said manor, and by and under the suits and services, rents, fines, and heriots therefore due and of right accustomed."

(*e*) "further"

COVENANT TO SURRENDER COPYHOLDS.

Receipt.

Covenant to surrender.

the sum of £——, at or [immediately] before the sealing and delivery of these presents, paid to the said C. D. by the said A. B. (the receipt of which &c., [*see Precedent XVI. p.* 194]); he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, [that he the said A. B., or his heirs, shall and will, at or before the next court to be holden in and for the manor of ——, in the county of ——, at the costs and charges of the said C. D., or his heirs, surrender, or cause and procure to be surrendered into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the

Parcels.

said manor: ALL &c. [*parcels*], to which said messuages and hereditaments the said A. B. was, at a court holden in and for the said manor on the —— day of ——, admitted as the heir of M. N., deceased; and also, ALL &c. [*parcels*], to which said last-mentioned hereditaments the said A. B. was, at a court holden in and for the said manor on the —— day of ——, admitted on the surrender of X. Y. [*general words*]; To THE USE of the said C. D., his heirs

To the use of purchaser.

and assigns, to be holden according to the custom of the said manor, and by and under the suits and services, rents, fines, and heriots therefore due and of right accustomed: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns] in manner following; (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said A. B., or any of his ancestors, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, he the said A. B., at the time of the [sealing and delivery of these presents, is] (*f*), lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said hereditaments and premises hereinbefore [covenanted to be] (*g*) surrendered, and every part thereof, for a

Covenants by vendor,

—for title;

(*f*) "said surrender was"

(*g*) "mentioned to have been"

COVENANT TO SURRENDER COPYHOLDS.

good, sure, perfect, absolute, and indefeasible estate of inheritance to him and his heirs in possession, according to the custom of the said manor, and by and under the suits and services, rents, fines, and heriots therefore due and of right accustomed, without any manner of condition, use, trust, property, power of revocation, equity of redemption, or any limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, charge, defeat, incumber, revoke, or make void the same: AND THAT for and notwithstanding any such act, deed, matter, or thing whatsoever, as aforesaid, he the said A. B. [now hath] (*h*) in himself good right, full power, and lawful and absolute authority to surrender the said hereditaments and premises hereinbefore [covenanted to be] (*i*) surrendered to the use of the said C. D., his heirs and assigns, according to the custom of the said manor, and in manner aforesaid, [according to the true intent and meaning of these presents]: AND THAT it shall be lawful for the said C. D., his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into, upon, and to have, hold, occupy, possess, and enjoy the said hereditaments and premises, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by the said A. B., or his heirs, or of or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or any of them, or his or any of his ancestors, but, nevertheless, under and subject to the rents, fines, heriots, suits and services therefore due and of right accustomed: AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, or otherwise by him the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and

—for right to surrender;

—for quiet enjoyment;

—free from incumbrances;

(*h*) "then had"

(*i*) "mentioned to have been"

COVENANT TO SURRENDER COPYHOLDS.

indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B., or his heirs, or any person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or any of them, or his or any of his ancestors: AND FURTHER, THAT he the said A. B., and his heirs, and all and every other person or persons having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises hereinbefore [covenanted to be] (*k*) surrendered, or any of them or any part thereof, from, or under, or in trust for him the said A. B., or his heirs, or any of his ancestors, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said C. D., his heirs and assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, things, devices, surrenders, and assurances in the law whatsoever, for the further, better, and more perfectly and absolutely surrendering and assuring of the said hereditaments and premises hereinbefore [covenanted to be] (*k*) surrendered, and every part thereof, to the use of the said C. D., his heirs and assigns, according to the custom of the said manor, and under and subject to the rents, fines, heriots, suits and services therefore due and of right accustomed, as by the said C. D., his heirs or assigns, or his or their counsel in the law shall be reasonably devised or advised and required. IN WITNESS &c.

—for further assurance.

(*k*) " mentioned to have been"

XXXIV.

COVENANT *to* SURRENDER COPYHOLDS.—RELEASE *by a* MORTGAGEE *who has not been admitted.—Variation where* MORTGAGEE *has been admitted.*

COPYHOLDS WITH RELEASE BY MORTGAGEE.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*vendor*], of the first part; C. D., of &c. [*mortgagee*], of the second part; and E. F., of &c., [*purchaser*], of the third part: WHEREAS, at a court holden in (*a*) and for the manor of ——, in the county of ——, on the 4th day of May, 1800, the said A. B. was admitted, on the surrender

Parties.

Recital of surrender to vendor.

(*a*) It is usual to recite that the court was holden *in*, as well as for, the manor, because a customary court cannot be held out of the manor, unless there be a custom to warrant it. (*Doe* d. *Leach* v. *Whitaker*, 5 B. & Ad. 409, 433). A lord may grant to, or admit, a copyhold tenant out of court, and also out of the manor; and a steward may take a surrender, but cannot admit out of the manor. (*Doe* d. *Leach* v. *Whitaker*, ubi supra). A steward may, however, by special authority from the lord, admit out of the manor. (Ibid.) See, too, the authorities cited in the judgment and arguments.

Customary Courts to be held within the manor.

It is very common in instruments relating to copyholds, to speak of the court as the "Court Baron and Customary Court." The Court Baron is the court of the freeholders of the manor, of which they, being suitors, are judges; the Customary Court is the court of the copyholders, and of that the lord or steward is judge. (Co. Lit. 58. a.; Scriven on Copyholds, part 3, ch. xvii.) When a manor has a Customary Court, as well as a Court Baron, the proceedings of both may, and generally are, entered on he same roll. (Co. Lit. 58. a.; Com. Dig. *Cop.* R. 2; Burton's Law of Real Property, p. 418, arts. 1261, 1262). In preparing drafts, it seems quite sufficient to mention the "court" simply, as the proper court will be intended to be meant; or, if the draftsman please, "Customary Court." To say, as sometimes is done, "Court Baron, *or* Customary Court," or "Court Baron" alone, is incorrect, as the copyholds are dealt with at the Customary Court; the phrase Court Baron *and* Customary Court is not objectionable, if, in truth, there were a Court Baron held with the Customary Court.

Distinction between the Court Baron and Customary Court.

COPYHOLDS WITH RELEASE BY MORTGAGEE.

of M. N., to ALL THAT [*parcels from the court rolls*] (*b*), To HOLD the same unto the said A. B., his heirs and assigns, according to the custom of the said manor, and by and under the suits, services, rents, fines, and heriots therefore due and of right accustomed: AND WHEREAS, at a court holden in and for the said manor, on the 3rd of January, 1801, the said A. B. surrendered the said messuages or tenements, lands, hereditaments, and premises, to which he was so admitted as aforesaid, into the hands of the lord of the said manor; to the use of the said C. D., his heirs and assigns, subject to a condition for making void the said surrender on payment by the said A. B., his heirs, executors, administrators, or assigns, unto the said C. D., his executors, administrators, or assigns, of the sum of £3,000 on the —— day of ——, with interest for the same, after the rate, and at the times, and in manner in the copy of the said surrender now in recital mentioned:

—of surrender by vendor to mortgagee.

—of surrender to vendor of another tenement.

AND WHEREAS at a court holden in and for the said manor, on the 5th day of February, 1802, the said A. B. was admitted on the surrender of P. Q. to [*parcels from the court of rolls*], To HOLD the same to the said C. D., his heirs and assigns, according to the custom of the said manor, and by and under the suits, services, rents, fines, and heriots, therefore due and of right accustomed: AND WHEREAS, by an indenture bearing date the 1st day of July, 1802, and made, or expressed to be made, between [*parties*],

—of vendor's covenant to surrender to mortgagee.

(*b*) The parcels are often mentioned in the recitals of the surrenders or admittances, the description being of course taken from the court rolls, and the modern description is added in the witnessing part. For the purchaser contracts to buy by the modern description, and there is sometimes a difficulty in making the reference from the description in the recited surrenders or admittances (if more than one) to the modern description. The object may generally be accomplished by referring from the recitals to the "hereditaments, firstly, secondly, &c., hereinafter described," and subjoining the modern description; but nothing is gained by this, and there is no objection in respect to copyhold property to mention the parcels in the recitals, there being no lease for a year. When the parcels are comprised in the recitals, the identification of them with the purchased property is made, it will be seen, in the recital of the contract for sale, and in the witnessing part. See further, ante, p. 67, n. (*b*), and p. 209, n. (*c*).

COPYHOLDS WITH RELEASE BY MORTGAGEE.

for the consideration therein mentioned (amongst other things) the said A. B. did covenant with the said C. D., that he the said A. B., his heirs or assigns, would surrender into the hands of the lord of the said manor, the several pieces or parcels of land, messuages, hereditaments, and premises, to which the said A. B. was admitted on the said 5th day of February, 1802, to the use of the said C. D., his heirs and assigns, subject to a condition in the said indenture mentioned, for making void the said surrender thereby covenanted to be made on payment by the said A. B., his heirs, executors, administrators, or assigns, unto the said C. D., his executors, administrators, or assigns, of the sum of £1,000, on the day therein mentioned, with interest for the same, after the rate, and at the times, and in manner therein mentioned: AND WHEREAS the said A. B., in pursuance of the said covenants in the said indenture contained, did, on the 2nd day of July, 1802, surrender into the hands of the lord of the said manor, the said hereditaments and premises by the said indenture covenanted to be surrendered to the use of the said C. D., his heirs and assigns, subject nevertheless to the condition in the said indenture mentioned: AND WHEREAS, by a deed poll bearing date the said 2nd day of July, 1802, and under the hand and seal of the said A. B.; the said A. B. charged all the said messuages, or tenements, hereditaments, and premises, comprised in the said surrender of the 3rd day of January, 1801, as well with the payment of the said sum of £1,000 and interest, as with the payment of the aforesaid sum of £3,000, and the interest to accrue due thereon as aforesaid (*c*): AND WHEREAS the

—of surrender accordingly.

—of charging the first mortgage on the after-purchased property.

—of the mortgage debts

(*c*) If the mortgagee has been admitted insert here—

Variation.

"And whereas, at a court holden in and for the said manor, on the —— day of ——, the said A. B. was admitted, in pursuance of the said surrenders of the 3rd day of January, 1801, and the 2nd day of July, 1802, respectively, to the said premises therein respectively comprised."

Of course, it is assumed that this is the correct place for the introduction of this recital, according to its date; if otherwise, or if there be more than one admittance, the recital or recitals must be inserted in their order of date.

COPYHOLDS WITH RELEASE BY MORTGAGEE.

repayment of the said sums of £3,000 and £1,000, and interest for the same respectively, was secured to the said C. D., his executors, administrators, and asssigns, as well by the mortgages aforesaid, as by mortgage of other hereditaments belonging to the said A. B. (*d*): AND WHEREAS, at a court holden in and for the said manor on the 7th day of November, 1802, the said A. B. was admitted on the surrender of X. Y. to [*parcels from the court rolls*], TO HOLD the same unto the said A. B., his heirs and assigns, according to the custom of the said manor, and by and under the suits, services, rents, fines, and heriots, therefore due and of right accustomed: AND WHEREAS the said principal sums of £3,000 and £1,000, remain due and owing on the aforesaid securities for the same respectively, but all interest on the same respectively has been paid up to the last day appointed for payment of interest on the same respectively: AND WHEREAS the said A. B., with the privity and consent of the said C. D., hath contracted and agreed with the said E. F. for the absolute sale to him of the said several messuages or tenements, and hereditaments, hereinafter particularly mentioned and covenanted to be surrendered, being the said hereditaments and premises to which the said A. B. was admitted on the 4th day of May, 1800, the 5th day of February, 1802, and the 7th day of November, 1802 respectively, as hereinbefore is mentioned, with their appurtenances, and the inheritance thereof in possession, according to the custom of the said manor, free from all incumbrances, except the rents, fines, heriots, suits, and services therefore due and of right accustomed, at or for the price or sum of £5,000: AND WHEREAS, upon the treaty for the said sale, it was agreed that the sum of £2,000, part of

—being otherwise secured.

—of surrender to vendor of another tenement.

—of state of mortgage debts.

—of contract for sale.

—of agreement that mortgagee should receive

Recitals in text not all essential.

(*d*) This recital, and the subsequent one respecting the state of the mortgage debt, are not absolutely essential, but they serve to render the narrative more intelligible. They are not essential, because, if C. D. chooses to release the purchased estate, it is of no consequence whether his debt be otherwise secured or not; and because, if A. B. and C. D. agree that C. D. shall receive a certain part of the purchase-money, it is of no importance how much mortgage-money is owing to him.

COPYHOLDS WITH RELEASE BY MORTGAGEE.

the said purchase-money or sum of £5,000, should be paid to the said C. D. in part payment and discharge of the said principal sums of £3,000 and £1,000 so due and owing to him as aforesaid, and that the said C. D. should release (*e*) the said hereditaments comprised in the aforesaid conditional surrenders (*f*) from the said sums of £3,000 and £1,000, and all interest for the same respectively, in manner hereinafter mentioned, and should enter into such covenant respecting the same as is hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the sum of £2,000 to the said C. D., at or immediately before the sealing of these presents paid by the said E. F., at the request and direction of the said A. B., (testified by his being a party to and executing these presents), (the receipt of which said sum of £2,000 he the said C. D. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns, and also the said A. B., his heirs, executors, administrators, and assigns for ever by these presents, and doth declare the same to be in part satisfaction of the said principal moneys so due and owing to him the said C. D. as aforesaid); And also in consideration of the sum of £3,000 to the said A. B. at the same time paid by the said E. F., with the privity and consent of the said C. D. (testified by his being a party to and executing these presents), (The payment and receipt in manner aforesaid of which said sums of £2,000 and £3,000 respectively, making together the said purchase-money or sum of £5,000, he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns for

part of the purchase-money, and release the property.

Witnesseth.

Consideration.

Further consideration.

(*e*) The variations in this and the subsequent notes apply to the case of the mortgagee having been admitted. In this place for "release," *substitute* "surrender."

Object of the variations in this and the subsequent notes.

(*f*) Insert "freed and discharged."

COPYHOLDS WITH RELEASE BY MORTGAGEE.

ever by these presents,) He the said (*g*) A. B., with the privity and consent of the said C. D., (testified as aforesaid) (*h*), doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns, that (*i*) [he the said A. B., or his] heirs, shall and will, at or before the next customary court to be holden in and for the said manor of ——, at the costs and charges of the said E. F. or his heirs, surrender, or cause and procure to be surrendered, into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the said manor,

Covenant by vendor to surrender.

Parcels.

ALL AND SINGULAR the said messuages, or tenements, lands, and hereditaments hereinbefore particularly mentioned, to which he the said A. B. was admitted on the 4th day of May, 1800, the 5th day of February, 1802, and the 7th day of November, 1802, respectively, as hereinbefore is mentioned, and which said messuages or tenements, lands, and hereditaments are delineated in the map or plan drawn in the margin of these presents, and are now better known by the description following, (that is to say) [*insert modern description of property—general words*]: TO THE USE of the said E. F., his heirs or assigns (*j*), to be holden of the

Modern description.

To the use of purchaser in fee.

(*g*) "C. D., so far as relates to his own acts and deeds, and to the acts and deeds of his heirs, and to the said premises comprised in the said surrender of the 3rd day of January, 1801, and the 2nd day of July, 1802, respectively, doth hereby for himself, his heirs, executors, and administrators, and the said"

(*h*) "And as to all the hereditaments hereinafter covenanted to be surrendered."

(*i*) For the words in brackets substitute "they the said C. D. and A. B., and each of them, or their respective heirs."

Creation of powers in copyholds. *The King* v. *The Lord of the Manor of Oundle.*

(*j*) It has been recently settled, that if copyholds be surrendered to such uses as A. B. shall appoint; and in default of, and until and subject to such appointment to the use of A. B. in fee, and A. B. appoint to C. D., C. D. can compel the lord to admit him under the original surrender without A. B. being first admitted and surrendering to C. D. (*The*

COPYHOLDS WITH RELEASE BY MORTGAGEE.

lord or lady, lords or ladies of the said manor, according to the custom thereof, and by and under the suits, services, rents, fines, and heriots therefore due and of right accustomed, but freed and discharged from the said principal sums of £3,000 and £1,000, and every part thereof respectively, and all interest now due or to grow due for the same respectively: AND THIS INDENTURE ALSO WITNESSETH (*k*), that, in pursuance of the said agreement in this behalf, and for the considerations aforesaid, he the said C. D., at the request of the said A. B., (testified as aforesaid), hath remised, released, and quit claimed, and by

Witnesseth, Secondly, release by mortgagee.

King v. *The Lord of the Manor of Oundle*, 1 Ad. & Ell. 283; S. C. 3 Nev. & Man. 484.) Of course, the application of the principle might be carried still further, for C. D. might appoint to such uses as E. F. should appoint, and in default to him in fee, and so on. The consequence would be, that, until either the original surrenderor or the purchaser, who was the donee of the power for the time being in force, died without exercising it, no surrender or admittance would be necessary, and the lord and steward would be deprived of all their emoluments arising from customary alienations. It is, however, apprehended that the lord may compel the tenant for the time being to attend at all the customary courts, and there to do suit and service; and that, by compelling such attendance, the tenancy would be made so burdensome to the surrenderor as to put an end to the practice. If a vendor has actually surrendered to uses in the above manner, it is probable that he could not afterwards compel the purchaser to be admitted, so as to relieve him from the annoyance; but, at any rate, it would seem that the counsel of a vendor ought to insist on the purchaser clothing himself with the legal estate, so as to release the vendor from any risk of being called on to attend courts, and do suit and service, and from all other liabilities incident to customary tenure. When a surrender has been made to uses in the above manner, it would seem that the purchaser could always, under the usual covenant for further assurance, compel the original vendor and his heirs to attend courts, do suit and service, be admitted, and do all acts needful for assuring the property to the uses; but that the costs of all such acts must be borne by the purchaser; and this would probably soon lead to the purchaser being admitted. It should be observed, that, if the form of surrender discussed in this note be adopted, the power should be, not simply to appoint by deed, (ante, p. 214), but by deed or will, so as to enable the purchaser to dispose of the land by will, without reference to his estate, because then the chain of appointments may be continued for an indefinite time.

(*k*) This witnessing part will be omitted if the mortgagee has been admitted.

COPYHOLDS WITH RELEASE BY MORTGAGEE.

these presents doth remise, release, and quit claim (*l*) unto the said E. F., his heirs and assigns, ALL SUCH and so many, and such part and parts of the said hereditaments and premises hereinbefore covenanted to be surrendered, as were comprised in the said conditional surrenders of the 3rd day of January, 1801, and the 2nd day of July, 1802, respectively, freed and discharged of and from the said principal sums of £3,000 and £1,000, and each of them and every part thereof respectively, and all interest for the same or either of them, or any part thereof respectively, and of and from all actions, suits, accounts, reckonings, claims, and demand whatsoever, either at law or in equity, for, upon account, or in respect of the said principal sums, or either of them, or any part thereof respectively, or the interest for the same, or either of them, or any part thereof respectively: AND THIS INDENTURE ALSO WITNESSETH (*m*), that, in pursuance of the said agreement

Parcels.

Witnesseth, Thirdly,—covenant

Operative words of release.

(*l*) These are the appropriate words of release, when it is intended to release *property* from any claim. The form anciently was "that the said [*releasor*] hath remised, released, and altogether from his heirs quiet claimed to the said [*releasee*], all the right, title, and claim, which he the said [*releasor*] hath, or by any means may have, of and in all that, &c." Lit. s. 445; and see Co. Lit. 264. b. This ancient form is now cut down to the present shape, and the words are repeated in the present tense; alterations which certainly have not improved the sense of the form.

When it is intended to release a *person* from a claim, the usual words of release are "acquit, release, and discharge;" but as well in this as in the former case, the word "release" alone, or any word of similar import, would be sufficient of itself. The word "renounce," mentioned by Lord Coke, (Co. Lit. 264. b.), as a word of release, is more properly a word of disclaimer, and is so used in modern instruments.

Satisfaction to be entered on the court rolls.

(*m*) This covenant to enter up satisfaction will not be needed when the mortgagee has been admitted; because, as the mortgagee will, in that case, join in the surrender, his so doing will furnish sufficient evidence on the court rolls of the satisfaction of the mortgage, so far as relates to the purchased property. When mortgages by conditional surrender of copyhold are discharged, care should always be taken that evidence of the satisfaction of the mortgage is in some way preserved *on the court rolls;* when the mortgage has rested simply in covenant, no notice of the satisfaction should be entered on the rolls.

COPYHOLDS WITH RELEASE BY MORTGAGEE.

in this behalf, and in consideration of the premises, he the said C. D., at the request of the said A. B., (testified as aforesaid), doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns, that he the said C. D., his executors or administrators, shall and will, at the costs of the said A. B., his heirs, executors, or administrators, immediately enter up, or cause and procure to be entered up on the court rolls of the said manor, satisfaction on the aforesaid conditional surrenders. [*Covenant by C. D. with E. F., his heirs and assigns, against incumbrances; see supra, p. 249. Covenants by A. B. with C. D., his heirs and assigns, notwithstanding any act done by A. B. and C. D.—for right to surrender—for quiet enjoyment—free from incumbrances—for further assurance. See supra, Precedents XXXIII. and XXI.*]

to enter up satisfaction.

XXXV.

BARGAIN AND SALE *of* COPYHOLDS, *under a* POWER *of* SALE *in a* WILL (*a*).

BARGAIN AND SALE OF COPYHOLDS.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., and C. D., of &c. [*vendors*], of the one part; and E. F., of &c. [*purchaser*], of the other part: WHEREAS G. H., late of &c., being seised of or entitled to the copyhold or customary messuages, lands, and hereditaments hereinafter particularly mentioned, and intended to be hereby bargained and sold, with their appurtenances, for an estate of inheritance to him and his heirs, according to the custom of the manor of ——, in the county of ——, of which the same hereditaments are holden, duly made,

Parties.

Recital of will devising copyholds.

(*a*) As to the operations of a bargain and sale, under a power (see supra, p. 196, note (*i*)); the present form may be easily adapted to the case of freehold estates.

BARGAIN AND SALE OF COPYHOLDS.

signed, and published (*b*) his last will and testament in writing, bearing date the —— day of ——, and thereby directed that all those his houses and lands at P. (being the said messuages, lands, and hereditaments hereinafter particularly mentioned, and intended to be hereby bargained and sold), should be sold by his executors thereinafter mentioned (*c*), and that the money to arise from such sale

—to be sold by executors.

(*b*) There seems to be no legal definition or explanation of the term "publish," but it appears to indicate a delivery or acknowledgment before witnesses. (See 1 Sug. Pow. 310, 312; *Curteis* v. *Kenrick*, 3 Mee. & Wels. 461; *Mackinley* v. *Sison*, 8 Sim. 561). A will made since the stat. 1 Vict. c. 26, does not need to be published, (sect. 9), and, therefore, in the recital of such a will, the form should be "duly made and signed." The word "duly," is used in relation to all wills, as expressing that they were duly made, according to the forms required for disposing of the species of property to which they relate. The old form (borrowed from pleadings in equity) of introducing wills of freehold estates with the allegation that the testator "made his last will and testament, duly executed and attested in manner required by law for rendering valid devises of freehold estates," is now little used, except in acts of Parliament and such other instruments as require to be approved by persons unacquainted with the language of conveyancers. The phrase "last will and testament, in writing," is apparently taken from the Statute of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5; but as the testator is said to have signed the will, it does not seem very necessary to allege that it was in writing, unless with a view to contradict the supposition of its being printed or engraved.

(*c*) The will in the text is informal; but it is usual in formal wills to direct that copyhold estates shall be sold by the trustees, instead of devising them to the trustees to sell; because, by so doing, the purchaser is at once admitted under the will, and bargain and sale, and the expense of the admittance of the trustees is saved. (*Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400; *Beal* v. *Shepherd*, Cro. Jac. 199). But it would be otherwise if a life estate preceded the power, for it would be necessary for the tenant for life to be admitted; and the admittance of a tenant for life being the admittance of the remainderman, no fine would be payable on the admittance to the estate in remainder, unless by special custom. (*Phypers* v. *Eburn*, 3 Bing. N. C. 250). It will be of no service to give a power for sale of copyhold, unless a sale is to take place immediately after the testator's death; for the lord is entitled to seize the land, unless some tenant is admitted within the usual time, *i. e.* at the third court after the death of the testator. (*Doe* d. *Bover* v. *Trueman*, 1 B. & Ad. 736). In default

should be applied in payment of his just debts, and funeral and testamentary expenses; and the said testator, by his said will, appointed the said A. B. and C. D. executors of the same (*d*): AND WHEREAS the said G. H. died in the month of ——, without having in anywise revoked or altered his said will, and the same was proved by the said A. B. and C. D. in the —— court of ——, on the —— day of ——: AND WHEREAS the said A. B. and C. D., pursuant to the direction in this behalf in the said will contained, have contracted and agreed with the said E. F. for the absolute sale to him of the said messuages, lands, and hereditaments hereinafter particularly mentioned, and intended to be hereby bargained and sold, with their appurtenances, and the inheritance thereof in possession, according to the custom of the said manor of ——, free from all incumbrances, except the rents, fines, heriots, suits, and services therefore due and of right accustomed, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, at &c.,

BARGAIN AND SALE OF COPYHOLDS.

—of death of testator and probate of his will.

—of contract for sale.

Witnesseth.

of an exercise of the power by the trustees, the heir is the person to be admitted, and he, on a sale by the trustees, will be a trustee for the purchaser; but there seems no objection to giving the power of appointment to the trustees, and devising the estate to them, until and in default of appointment. (*The King* v. *The Lord of the Manor of Oundle*, 1 Ad. & Ell. 283; S. C. 3 Nev. & Man. 484). And such is the most convenient course.

(*d*) As the money to arise from the sale is to be applied in payment of debts, the executor can give effectual receipts for the purchase-money. (2 Sugd. V. & P. 33). It does not appear to have been settled in what cases *executors* having power to sell lands, can give effectual receipts for the purchase-money. But, on principle, it would seem that they are able to give effectual receipts whenever the purchase-money is to fall into and form part of the general personal estate, and in all cases in which trustees for sale would have such power. See 2 Sugd. V. & P., ch. xi., s. 1. If the trust of the purchase-money is simply for payment of legacies, it is apprehended that the purchaser must see that it is applied according to the trust, and in that case the cestui que trusts should join in the conveyance and covenant for title. (See *Horn* v. *Horn*, 2 Sim. & Stu. 448, stat. 3 & 4 Will. 4, c. 104; *Braithwaite* v. *Britain*, 1 Keen, 206).

BARGAIN AND SALE OF COPYHOLDS.

the receipt &c. [*see supra*, p. 194], and pursuant to and by force and virtue and in exercise and execution of the power or authority to them, the said A. B. and C. D., for this purpose given by the said will of the said G. H., as hereinbefore is mentioned, and of every or any other power or authority in anywise enabling them in this behalf, they the said A. B. and C. D. have and each of them hath bargained and sold, and by these presents do and each of them doth bargain and sell unto the said E. F., his heirs and assigns, ALL THOSE &c. [*parcels—general words—varying the estate clause as follows:*] AND ALL THE ESTATE, right, title, interest, poperty, claim, and demand whatsoever, either at law or in equity, late of the said G. H., of, in, to, out of, or upon the said premises, or any of them, or any part thereof: TO HAVE AND TO HOLD the said messuages, lands, and hereditaments, and all and singular other the premises hereby bargained and sold, or expressed and intended so to be, unto the said E. F., his heirs and assigns: To the use of the said E. F., his heirs and assigns for ever, according to the custom of the said manor, and by and under the suits, services, rents, fines, and heriots, therefore due and of right accustomed (*e*), [*Covenants by A. B. and C. D. severally, that they have done no act to prevent their exercising their power—and against incumbrances; see supra, pp. 232 and 241.*] IN WITNESS, &c.

Bargain and Sale.

Parcels.

And all the estate, &c.

Habendum.

To the use of purchaser.

(*e*) Some draftsmen add "to the intent that the said A. B. may be admitted, &c." but the addition does not appear to be of any use.

XXXVI.

CONVEYANCE *of* FREEHOLDS *and* COVENANT *to* SURRENDER COPYHOLDS, *where Part of the* PURCHASE-MONEY REMAINS SECURED *upon the* ESTATE (*a*).

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*vendor*], of the first part; C. D., of &c., [*purchaser*], of the second part; and E. F., of &c., [*trustee*], of the third part: WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the pieces or parcels of land hereinafter particularly mentioned, and intended to be hereby released, with the appurtenances and the inheritance thereof in fee-simple in possession, free from incumbrances; and also of the copyhold or customary pieces or parcels of land, and other hereditaments hereinafter particularly mentioned, and covenanted to be surrendered, with the appurtenances and the inheritance thereof in possession, according to the custom of the manor of which the same are holden, free from incumbrances, except the rents, fines, heriots, suits, and services, therefore due and of right accustomed, at or for the price or sum of £1,500: AND WHEREAS, upon the treaty for the said purchase, it was agreed that the sum of £1,000, part of the said purchase-money, should be retained by the said C. D., and that the payment thereof, with interest for the same in the meantime, should be secured to the said A. B., his executors, administrators,

Parties.

Recital of contract for sale.

—of agreement that part of the purchase-money should remain on mortgage.

(*a*) This precedent may easily be adapted to the case in which part of the purchase-money is advanced by a mortgagee. See infra, the form of a conveyance of freeholds, leaseholds, and copyholds, with a mortgage for securing part of the purchase-money, Precedent XXXIX.

BARGAIN AND SALE OF COPYHOLDS.

the receipt &c. [*see supra*, p. 194], and pursuant to and by force and virtue and in exercise and execution of the power or authority to them, the said A. B. and C. D., for this purpose given by the said will of the said G. H., as hereinbefore is mentioned, and of every or any other power or authority in anywise enabling them in this behalf,

Bargain and Sale.

they the said A. B. and C. D. have and each of them hath bargained and sold, and by these presents do and each of them doth bargain and sell unto the said E. F., his heirs

Parcels.

and assigns, ALL THOSE &c. [*parcels—general words—*

And all the estate, &c.

varying the estate clause as follows:] AND ALL THE ESTATE, right, title, interest, poperty, claim, and demand whatsoever, either at law or in equity, late of the said G. H., of, in, to, out of, or upon the said premises, or any

Habendum.

of them, or any part thereof: TO HAVE AND TO HOLD the said messuages, lands, and hereditaments, and all and singular other the premises hereby bargained and sold, or expressed and intended so to be, unto the said E. F., his

To the use of purchaser.

heirs and assigns: To the use of the said E. F., his heirs and assigns for ever, according to the custom of the said manor, and by and under the suits, services, rents, fines, and heriots, therefore due and of right accustomed (*e*), [*Covenants by A. B. and C. D. severally, that they have done no act to prevent their exercising their power—and against incumbrances; see supra, pp. 232 and 241.*] IN WITNESS, &c.

(*e*) Some draftsmen add "to the intent that the said A. B. may be admitted, &c." but the addition does not appear to be of any use.

XXXVI.

CONVEYANCE *of* FREEHOLDS *and* COVENANT *to* SURRENDER COPYHOLDS, *where Part of the* PURCHASE-MONEY REMAINS SECURED *upon the* ESTATE (*a*).

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*vendor*], of the first part; C. D., of &c., [*purchaser*], of the second part; and E. F., of &c., [*trustee*], of the third part: WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the pieces or parcels of land hereinafter particularly mentioned, and intended to be hereby released, with the appurtenances and the inheritance thereof in fee-simple in possession, free from incumbrances; and also of the copyhold or customary pieces or parcels of land, and other hereditaments hereinafter particularly mentioned, and covenanted to be surrendered, with the appurtenances and the inheritance thereof in possession, according to the custom of the manor of which the same are holden, free from incumbrances, except the rents, fines, heriots, suits, and services, therefore due and of right accustomed, at or for the price or sum of £1,500: AND WHEREAS, upon the treaty for the said purchase, it was agreed that the sum of £1,000, part of the said purchase-money, should be retained by the said C. D., and that the payment thereof, with interest for the same in the meantime, should be secured to the said A. B., his executors, administrators,

Parties.

Recital of contract for sale.

—of agreement that part of the purchase-money should remain on mortgage.

(*a*) This precedent may easily be adapted to the case in which part of the purchase-money is advanced by a mortgagee. See infra, the form of a conveyance of freeholds, leaseholds, and copyholds, with a mortgage for securing part of the purchase-money, Precedent XXXIX.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

and assigns, by a mortgage, in manner hereinafter mentioned, of the said hereditaments agreed to be purchased: AND WHEREAS, for the purposes of the act of Parliament imposing an ad valorem duty upon conveyances on the sale of land or other property, it hath been agreed that the sum of £300, part of the said purchase-money, shall be the price or consideration-money for the said freehold hereditaments, and that the sum of £1,200, the residue of the said purchase-money, shall be the price or consideration-money for the said copyhold or customary hereditaments (*b*): AND WHEREAS, in pursuance of the said agreement, the said C. D. hath, at or immediately before the sealing and delivery of these presents, paid to the said A. B. the sum of £500 in part of the said purchase-money or sum of £1,500 (*c*): NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreements, and in consideration of the sum of £300, part of the said several sums of £500 and £1,000 respectively paid, and secured to be paid to the said A. B., as is herein mentioned, (the receipt of which said sum of £500, so as aforesaid paid to the said A. B., he the said A. B. doth hereby acknowledge, and of and from &c., *see supra, p.* 194), He the said A. B. hath granted, aliened, released, and confirmed, and by these presents doth grant, alien, release, and confirm unto the said C. D. (in his actual possession, &c., *see supra, p.* 198), and his heirs, ALL THAT, &c. [*freehold parcels—general words*], TO HAVE AND TO HOLD the said pieces or parcels of land and hereditaments, and all and singular other the premises hereinbefore granted and released or expressed and intended so to be, unto the said C. D. and his heirs: TO THE USE of the said A. B., his executors, administrators, and assigns, for the term of 1,000 years, to commence and be computed

—of apportionment of purchase-money for the stamp duty.

—of payment of part of purchase-money.

Witnesseth.

Consideration.

Receipt.

Conveyance.

Freehold parcels.

Habendum.

To use of vendor for a term.

(*b*) See the Stamp Act, 55 Geo. 3, c. 184, Schedule Art. Conveyance; and ante, p. 104, n. (*b*).

(*c*) The consideration is here recited to have been paid, instead of the usual statement to that effect in the witnessing part. The frame of the draft occasions this deviation from the common practice.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

from the day next before the day of the date of these presents, without impeachment of waste, subject nevertheless to the proviso or condition hereinafter contained (*d*) for making void the same term, and from and immediately after the expiration or sooner determination of the said term, and in the meantime subject thereto, to [*common uses to bar dower in favour of C. D., with a declaration to preclude a future wife from dower. See supra, p. 214.*]

and subject thereto to uses to bar dower for the purchaser.

AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the sum of £1,200, the residue of the said several sums of £500, and £1,000 respectively paid, and secured to be paid to the said A. B., as herein is mentioned, HE THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that he the said A. B., or his heirs, shall and will, at or before the next court baron and customary court to be holden in and for the manor of ——, in the county of ——, at the costs and charges of the said C. D. or his heirs, surrender or cause and procure to be surrendered into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the said manor: ALL &c. [*part of copyhold parcels*], TO ALL which several copyhold or customary hereditaments the said A. B. was admitted as the heir of B. B. deceased, at a court holden in and for the said manor, on the —— day of ——: AND ALSO ALL THAT, &c., [*remainder of copyhold parcels*], TO ALL which said last-mentioned copyhold or customary hereditaments the said A. B. was admitted on the surrender of M. N., at a court holden in and for the said manor, on the —— day of —— [*general words*]: TO THE USE of the said E. F., his heirs and assigns; nevertheless, in trust for the said C. D., his heirs

Witnesseth, Secondly.

Covenant by vendor to surrender.

Copyhold parcels.

To the use of trustee for purchaser.

(*d*) If the mortgage be in fee, the proviso should be inserted here, and should be to the effect, that, on payment of the principal money and interest, the mortgagee shall convey to uses to bar dower in favour of the purchaser, or to whatever uses are intended.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

and assigns (*e*), for ever, according to the custom of the said manor, and to be holden by and under the suits, services, rents, fines, and heriots, therefore due and of right accustomed: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, and also as a separate covenant, and so far as relates to the said copyhold or customary hereditaments, with the said E. F., his heirs and assigns, in manner following (that is to say), that, for and notwithstanding any act, deed, matter, or thing whatsoever, by him the said A. B., or any of his ancestors, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, he the said A. B., at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to, the said hereditaments hereinbefore granted and released, or expressed and intended so to be, and every part thereof, for a good, sure, perfect, absolute, and indefeasible estate of inheritance, in fee-simple in possession, and of, and in or to the said hereditaments hereinbefore covenanted to be surrendered, and every part thereof, for a good, sure, perfect, absolute, and indefeasible estate of inheritance, to him and his heirs, in possession, according to the custom of the said manor of ——, and by and under the suits, services, rents, fines, and heriots, therefore due and of right accustomed, without any manner of condition, use, trust, property, power of revocation, equity of redemption, remainder, or limitation of any use or uses, or any other restraint, cause, matter, or thing

Covenants by vendor.

—for title.

(*e*) The copyholds are surrendered to a trustee, and not to the purchaser himself, in order to avoid vesting the legal estate in the purchaser. See a different form of accomplishing the same object, in the case of a conveyance of freeholds, leaseholds, and copyholds, with a mortgage to secure part of the purchase-money, infra, Precedent XXXIX.

The form in the Precedent referred to is the one most to be recommended for use; for, since the stat. 1 & 2 Vict. c. 110, (s. 113), a judgment might be held to be binding on the momentary equitable estate of the purchaser.

whatsoever, to alter, charge, defeat, incumber, revoke, or make void the same estates, or either of them: AND THAT, for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he, the said A. B., now hath in himself good right, full power, and absolute authority to grant, alien, release, and confirm the said hereditaments hereinbefore granted, aliened, released, and confirmed, or expressed and intended so to be, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; and also to surrender the said hereditaments and premises hereinbefore covenanted to be surrendered to the use of the said E. F., his heirs and assigns, according to the custom of the said manor and in manner aforesaid, according to the true intent and meaning of these presents: AND THAT THE SAID hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, shall and may, from time to time and at all times hereafter, go, remain, and be to the uses hereinbefore limited, expressed, and declared, of and concerning the same, and that the said hereditaments and premises hereinbefore covenanted to be surrendered shall and may, from time to time, and at all times hereafter, go, remain, and be to the use of the said E. F., his heirs and assigns, and that as well the said hereditaments hereinbefore granted and released, or expressed and intended so to be, as the said hereditaments hereinbefore covenanted to be surrendered, shall and may, at all times hereafter, be peaceably and quietly entered into and upon, and be held, occupied, possessed, and enjoyed, and the rents, issues, and profits thereof respectively had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by the said A. B. or his heirs, or of or by any other person or persons, lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or any of them, or his or any of his ancestors, [*free from incumbrances. See supra*, p. 203]: AND FURTHER, THAT HE THE SAID A. B., and his heirs, and all and every other person or persons claiming, or who shall or may have or claim, any estate, right, title, interest, inheritance, use,

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

—for right to convey and surrender.

—for quiet enjoyment.

—free from incumbrances.

—for further assurance.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises hereinbefore granted and released, and covenanted to be surrendered respectively, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under or in trust for him the said A. B., or his heirs, or any of his ancestors, shall and will, from time to time, and at all times hereafter, upon every reasonable request, to be made for that purpose, by the said C. D., his heirs, appointees, or assigns, or by any other person or persons for the time being interested in the said premises or any of them, under and by virtue of these presents, and at the proper costs and charges in the law of the person or persons requiring the same, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying, surrendering, and assuring of the said hereditaments and premises hereinbefore granted and released, and covenanted to be surrendered respectively, or expressed and intended so to be, and every part thereof, to the uses and in manner aforesaid, as by the person or persons making such request, his or their counsel in the law, shall be reasonably advised or devised and required: PROVIDED ALWAYS, nevertheless, and it is hereby agreed and declared between and by the said A. B. and C. D., and the true intent and meaning of them and of these presents, nevertheless, is, that if the said C. D., his heirs, executors, administrators, or assigns, shall and do pay, or cause to be paid, to the said A. B., his executors, administrators, or assigns, the sum of £1,000, and the sum of 40*l.*, as and for one year's interest for the same at the rate of 4*l.* for £100, for a year, making together the sum of £1,040, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned; (that is to say), the sum of £20, being half a year's interest for the said sum of £1,000 at the rate aforesaid, on the —— day of ——-, and the sum of £1,020 residue

Proviso for cesser of term on payment of mortgage-money.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

thereof, being the whole of the said principal sum of £1,000 and another half year's interest for the same at the rate aforesaid, on the —— day of ——, without any deduction whatsoever for any present or future taxes or impositions, or any other matter, cause, or thing whatsoever, then and in such case, and from and immediately after such payment shall be so made as aforesaid, the said term of one thousand years shall cease, determine, and be absolutely void, to all intents and purposes whatever (*f*): AND THIS INDENTURE ALSO WITNESSETH, that, for further securing the payment of the said sum of £1,000, and the interest thereof, to the said A. B., his executors, administrators, or assigns, the said C. D. doth hereby for himself, his heirs, executors, and administrators, covenant with the said A. B., his heirs and assigns, by these presents, that he the said C. D., or his heirs, shall and will, at the costs and charges of him the said C. D., his heirs, executors, or administrators, immediately after the said copyhold, or customary hereditaments, hereinafter mentioned to be surrendered, shall have been surrendered accordingly, to the use of the said E. F., his heirs and assigns, cause and procure the said E. F. to be admitted to the said copyhold or customary hereditaments, and, upon his admission thereto, to surrender the same into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the said manor, to the use of the said A. B., his heirs and assigns (*g*), but subject, nevertheless, to a condition for making such surrender void on payment by the said E. F., his heirs or assigns, or by the said C. D., his heirs, executors, administrators, or assigns, unto the said A. B., his executors, administrators, or assigns, of the said sum of £1,040, in the parts and at the times, and in manner in the pro-

Witnesseth, Thirdly,—Covenant by purchaser for surrender of the copyhold, to secure unpaid purchase-money.

(*f*) Longer forms of this proviso will be found in the Precedents of mortgages, infra.

(*g*) Terms of years in copyholds may be created by surrender (*Earl of Bath* v. *Abney*, 1 Burr. 206); but the practice is not usual. (Burton's Law of Real Property, p. 436; Art. 1314). Hence, in the text, the surrender is to be to the vendor, his heirs and assigns.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

viso for redemption hereinbefore contained appointed for the payment of the same: AND THE SAID C. D. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., his executors and administrators, that he, the said C. D., his heirs, executors, or administrators, shall and will pay, or cause to be paid, to the said A. B., his heirs, executors, or administrators, the aforesaid sum of £1,040, in the parts, shares, and proportions, and on or at the days or times in the aforesaid proviso or agreement mentioned or appointed for payment thereof, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents; and in case the said principal sum of £1,000 shall not be paid at the time hereinbefore mentioned or appointed for payment thereof, shall and will, so long as the same or any part thereof shall remain due on the security of these presents, pay, or cause to be paid, to the said A. B., his executors, administrators, or assigns, interest for the said sum of £1,000, or for so much thereof as for the time being shall remain unpaid, after the rate of 4*l.* for £100 for a year, by equal half-yearly payments, on the —— day of ——, and the —— day of ——, in every year: AND THE SAID C. D. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., his executors, administrators, and assigns, and also as a separate covenant, and so far as relates to the said copyhold or customary hereditaments, with the said A. B., his heirs and assigns, that if default shall be made in payment of the said sum of £1,040, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said A. B., his executors, administrators, or assigns, at any time or times thereafter, during the continuance of the said term of one thousand years, into and upon all and every the said hereditaments and premises hereinbefore released or expressed, and intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive

Covenant by purchaser for payment of the money remaining on mortgage.

—and of the interest.

Covenants by purchaser.

—for quiet enjoyment after default.

and take the rents, issues, and profits thereof, to and for his and their own use, for all the residue which shall be then to come of the said term of one thousand years, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of, from, or by the said C. D., his heirs, appointees, or assigns, or any other person or persons whatsoever, having or lawfully or equitably claiming, or to have or lawfully or equitably claim, any estate, right, title, or interest in, of, or to the same hereditaments and premises, or any of them, or any part or parts thereof; and also, that, in case of such default, as aforesaid, it shall be lawful for the said A. B., his heirs and assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore covenanted to be surrendered, or any of them, or any part or parts thereof, to enter, and the same from thenceforth, and at all times thereafter, peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof, to and for his and their own use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, as aforesaid; AND THAT, as well as to the said hereditaments and premises hereinbefore released or expressed, and intended so to be, as to the said hereditaments and premises hereinbefore covenanted to be surrendered, free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise, by the said C. D., his heirs, executors, or administrators, well and sufficiently saved, protected, kept harmless and indemnified, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever: AND FURTHER, THAT HE THE SAID C. D., his heirs, appointees, and assigns, (and so far as relates to the said copyhold hereditaments, the said E. F., his heirs and assigns), and all and every other persons and person whomsoever, having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim, any estate, right, title, or interest, of, in, or to the said hereditaments and premises hereinbefore released and covenanted to be surrendered respectively, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

—free from incumbrances.

—for further assurance.

FREEHOLDS AND COPYHOLDS—PART OF THE PURCHASE-MONEY REMAINING UNPAID.

will, from time to time and at all times hereafter, upon the request of the said A. B., his heirs, executors, administrators or assigns, but at the costs and charges of the said C. D., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, conveyances, surrenders, admittances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying, and assuring all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, unto the said A. B., his executors, administrators, and assigns, for all the residue which shall be then to come of the said term of one thousand years, and for surrendering and assuring all the said hereditaments and premises hereinbefore covenanted to be surrendered unto the said A. B., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said A. B., his executors, administrators, heirs, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required: PROVIDED NEVERTHELESS, and it is hereby agreed and declared between and by the parties to these presents, that it shall be lawful for the said C. D. and E. F. respectively, and their respective heirs, appointees, and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy, all the said hereditaments hereinbefore released and covenanted to be surrendered respectively, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof respectively, to their own use respectively, until default shall be made in payment of the said sum of £1,040, or some part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., his executors, administrators, heirs, or assigns, or by any other person or persons whomsoever, lawfully claiming or to claim, by, from, or under him, them, or any of them (*h*). IN WITNESS, &c.

Proviso for quiet enjoyment until default.

(*h*) The vendor mortgagee taking the freehold for a term only, will not

XXXVII.

ASSIGNMENT *of* LEASEHOLDS.

LEASEHOLDS.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*vendor*], of the one part, and C. D., of &c. [*purchaser*], of the other part: WHEREAS, by an indenture bearing date the —— day of ——, and made, or expressed to be made, between E. F. of the one part, and G. H. of the other part, for the considerations therein mentioned, the said E. F. did demise unto the said G. H., his executors, administrators, and assigns, [*parcels from the lease*] (*a*), with their

Parties.

Recital of lease.

be entitled to the custody of the title deeds. (Ante, p. 45, note). The purchaser should, therefore, have covenanted with the vendor, to allow him to retain the title deeds. The covenant might be in the following form:

"And the said C. D. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., his executors, administrators, and assigns, that he the said C. D., his heirs and assigns, shall and will, at all times hereafter, during the continuance of the said term of one thousand years, permit and suffer the said A. B., his executors, administrators, and assigns, to retain in their and his custody and possession all and singular the deeds, documents, muniments, and evidences of title, of or relating to the said hereditaments comprised in the said term of one thousand years, in the same manner, and with all the same powers and privileges concerning the same, as though the said A. B. were the legal owner of the freehold and inheritance of the same premises."

(*a*) In assignments of leaseholds, the parcels are always stated in the recital of the lease. (See ante, p. 209, n. (*c*).) If buildings have been erected on, or other alterations made in the property, subsequent to the lease, the fact should be recited.

LEASEHOLDS.

appurtenances: To HOLD the same unto the said G. H., his executors, administrators, and assigns, from the —— day of —— then last, for the term of —— years, at the yearly rent of £——, and under and subject to the covenants, conditions, and agreements therein contained, and on the part of the lessee, his executors, administrators, and assigns to be observed and performed: AND WHEREAS, by divers mesne assignments and acts in the law, and ultimately by an indenture bearing date the —— day of ——, and made or expressed to be made between [*parties*], the said premises, comprised in the said indenture of the —— day of ——, became vested in the said A. B. for the residue then to come of the said term of —— years (*b*): AND WHEREAS the said A. B. hath contracted and agreed with the said C. D., for the sale to him of the said hereditaments and premises comprised in the said indenture of the —— day of ——, [*the lease*], for the residue now to come of the said term of —— years, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH,

—of its having become vested in vendor.

—of contract for sale.

Witnesseth Assignment.

Recital of title to leases.

(*b*) This form of recital is generally employed, and is extremely useful, in assurances of estates and interests of which it is necessary to shew the creation, and yet the circumstances are such that the recitals of the title can be conveniently commenced at a subsequent period. The instrument to which the recitals may be thus brought down, is that one, which, if the estate were freehold, would form the commencement of the recitals (see the next Precedent); for it is properly considered that the intermediate assurances of the property are simply matter of title, and would not, if set forth, in anywise conduce to the understanding of the principal deed. The most familiar use of this recital is in assignments of leases and terms of years, but the form may be advantageously used in instruments relating to policies of assurance, and other similar interests. In dealing with long terms of years, it is absolutely necessary, for it would be practically impossible to recite the title to a long term from its creation. Of course the form is not to be indiscriminately applied in all cases. If the assignor in the principal deed is the immediate assignee or representative of the original lessee, it would be untrue and absurd to say that the terms had passed by divers mesne assignments and acts in the law; and so, if it happen that the term has passed from one to another solely by assignments, or solely by acts in the law, it is incorrect to state that it has passed by assignments and acts in the law. The form must be used with due regard to the circumstances of the case.

LEASEHOLDS.

that, in pursuance of the said agreement, and in consideration, &c. [*see supra*, p. 194]: He the said A. B. hath assigned, and by these presents doth assign (*c*) unto the said C. D., his executors, administrators, and assigns: ALL THOSE the said [*messuages, pieces of land, &c., as the case may be*], hereditaments and premises by the said indenture of the —— day of ——, [*the lease*], demised or expressed, and intended so to be (*d*), with their rights, easements, and appurtenances: AND ALL THE ESTATE, right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said A. B., of, in, to, out of, or upon, the same premises, or any of them, or any part thereof: TO HAVE AND TO HOLD the said [*messuages, pieces of land, &c., as the case may be*], and hereditaments, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, henceforth, for the residue now to come of the said term of —— years (*e*), at the rent, and under and subject

Parcels.

And all the estate.

Habendum.

To purchaser.

(*c*) With respect to the use of "assign," as the only operative word, see ante, p. 196, n. (*i*). The words "assign, transfer, and set over," or "bargain, sell, assign, transfer, and set over," are often employed to lengthen the form.

General words in assignment of leaseholds.

(*d*) It is not usual to insert general words in assignments of leaseholds, because it is considered that the lease contains them, and the assignment is of nothing more than is contained in the leases. But, in some cases, and especially in assignments of old leases, or of building leases, new general words may be appropriately employed, because, in the course of time, or by alterations in the property itself, or in the neighbourhood, new rights and easements may have been acquired.

If buildings, or machinery, or the like, have been erected on the property since the lease, it is well to notice them in the witnessing part, as well as in the recitals. (See supra, n. (*a*).) The form is

"Together with all those [*messuages, &c., as the case may be*], hereinbefore mentioned to have been erected and built upon the said piece or parcel of land,"

or to that effect, as nearly as circumstances permit.

(*e*) The length of the deed is often increased by the use of the expression,

"for all the rest, residue, and remainder, now to come and

LEASEHOLDS.

to the covenants, conditions, and agreements, by and in the said indenture of the —— day of ——, [*the lease*], reserved and contained, and from and after the —— day of —— last (*f*), on the part of the lessee, his executors, administrators, or assigns, to be paid, observed, and performed: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, in manner following, (that is to say), that, for and notwithstanding any act, deed, matter, or thing, whatsoever, by him the said A. B. made, done, committed, or executed, or knowingly or willingly permitted or suffered, to the contrary, the said indenture of lease of the —— day of ——, at the time of the sealing and delivery of these presents, is a good and effectual lease in the law of the said hereditaments and premises therein comprised, and now is in full force, unforfeited, unsurrendered, and in nowise become void or voidable: AND THAT all and singular the rents, covenants, conditions, and agreements, in and by the said indenture of the —— day of ——, [*the lease*], reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be paid, observed, and performed, have been paid, observed, and performed up to the said —— day of —— last (*g*): AND THAT, for and notwithstanding any such act, deed, matter, or thing, as aforesaid, he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to assign the said hereditaments and premises hereinbefore assigned, or expressed

Covenants by vendor.

—that the lease is good.

—that the rents and covenants have been paid and observed.

—for right to assign.

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unexpired, of the said term of —— years, granted by the said indenture of lease of the —— day of ——, and for all other the estate, term, and interest of the said [*vendor*] therein."

(*f*) The day referred to may be subsequent to the assignment, and then "next" will be substituted for "last," or the assignment may be dated on the day from which the assignee's liability to the rent and covenant is to begin, and the word "henceforth" be substituted for the expression in the text.

(*g*) See the preceding note.

LEASEHOLDS.

and intended so to be, unto the said C. D., his executors, administrators, and assigns, for the residue now to come of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents: AND THAT it shall be lawful for the said C. D., his executors, administrators, and assigns, from time to time and at all times hereafter during the continuance of the said term of —— years, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy, the said hereditaments therein comprised, and receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of, from, or by him the said A. B., his executors, administrators, or assigns, or any other person or persons lawfully or equitably claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them: AND THAT, free and clear, and freely and clearly acquitted, exonerated, and released, or otherwise, by the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or to be hereafter had, made, executed, occasioned, or suffered, by the said A. B., his executors or administrators, or any person or persons lawfully or equitably claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them: AND FURTHER, THAT the said A. B., his executors and administrators, and all and every other person and persons whomsoever, having or claiming, or who shall or may have or claim any estate, right, title, term, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises, hereinbefore assigned or expressed, and intended so to be, or any of them, or any part thereof, by, through, from, under, or in trust for him the said A. B., his executors or administrators, shall and will, from time

—for quiet enjoyment.

—free from incumbrances.

—for further assurance.

LEASEHOLDS.

to time, and at all times during the continuance of the said term of —— years, upon every reasonable request to be made for that purpose, by and at the costs of the said C. D., his executors, administrators, or assigns, make, do, and execute, and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring the said hereditaments and premises, hereinbefore assigned, or expressed and intended so to be, and every part thereof, unto the said C. D., his executors, administrators, and assigns, for the residue which shall be then to come of the said term of —— years, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required; AND THE SAID C. D. doth hereby for himself, his heirs, executors, and administrators, covenant with the said A. B., his executors and administrators, that he the said C. D., his executors, administrators, or assigns, shall and will henceforth, from time to time, and at all times during the continuance of the said term of —— years, pay the said yearly rent of £ ——, by the said indenture of the —— day of —— reserved, and from and after the —— day of —— last, to become payable, and observe and perform all and every the covenants, conditions, and agreements in the same indenture contained, and on the part of the lessee, his executors, administrators or assigns, from and after the said —— day of —— last, to be observed or performed: and shall and will from time to time, and at all times hereafter, save, defend, keep harmless and indemnified, the said A. B., his executors and administrators, and his and their estates and effects, of, from, and against all actions, suits, damages, costs, expenses, claims, and demands, for or by reason or on account of the non-payment of the said rent, or any part thereof, or the breach, or non-observance, or non-performance of the said covenants, conditions, or agreements, or any of them (*h*). IN WITNESS, &c.

Covenants by purchaser to pay rent and perform covenants.

—and indemnify vendor in respect thereof.

Liability of the

(*h*) The purchaser of a lease must covenant to indemnify the vendor

XXXVIII.

ASSIGNMENT *of* LEASEHOLDS *by a* MORTGAGOR *and his* TRUSTEE, *and by* FIRST *and* SECOND MORTGAGEES, *and their* TRUSTEE, *to* TWO PURCHASERS *as* TENANTS IN COMMON.

LEASEHOLDS TO TENANTS IN COMMON.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*trustee of the original leases for the mortgagor*], Parties.

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against the rent and covenants, except in cases in which the vendor is not himself liable, as where he is the assignee or the purchaser from the assignee of a bankrupt. (See ante, p. 86, n. (*h*).) It seems, that, if in the habendum of the assignment there be the words, "he the said [*assignee*], his executors, administrators, or assigns paying the rent and performing the covenants in the said indenture of lease mentioned, and indemnifying the said [*assignor—the lessee*], his executors, administrators, and assigns, against the same," they will constitute a covenant by the assignee to that effect. (Lord *Mansfield* in *Chancellor* v. *Poole*, 2 Doug. 764, 767; see, too, 1 Cro. & Mee. 660). But the words in the habendum "subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease," do not constitute a covenant, and in the absence of an express stipulation, an assignee is not liable for rent accrued due, or covenant broken, after he has assigned over. (*Wolveridge* v. *Steward*, 1 Cro. & Mee. 644, reversing *Steward* v. *Wolveridge*, 9 Bing. 60; 2 Moo. & Scott, 75). But even in the absence of express stipulations, if an assignee of a lease neglect to perform the covenants, so that damages are recovered against the lessee by the lessor, the assignee, even after he has assigned over, is liable to the lessee for the damages occasioned by his neglect before the assignment. (*Burnett* v. *Lynch*, 5 B. & C. 589; and also to the lessor, *Harley* v. *King*, 2 Cro. Mee. & Ros. 18); and it seems that such is the law, too, in the case of an equitable assignee. (*Close* v. *Wilberforce*, 1 Beav. 112). The covenant to pay and perform is not, it seems, qualified by the covenant to indemnify, so as to oblige the assignee to wait till he is actually indemnified before he brings his action. (See infra, Precedent XLII. n. (*l*)). It may be convenient to observe, that the doctrine stated supra, p. 159, on the authority of *Flight* v. *Bentley*, has been overruled. (*Moores* v. *Choat*, 8 Sim. 508: *Lucas* v. *Comerford*, Id. 499).

assignee to indemnify the assignor against the rent and covenants.

Covenant to indemnify does not qualify the preceding covenant.

LEASEHOLDS TO TENANTS IN COMMON.

of the first part; C. D., of &c., [*trustee of underleases for the mortgagees*], of the second part; E. F., of &c., [*first mortgagee*], of the third part; G. H., of &c., and J. K., of &c. [*second mortgagees*], of the fourth part; L. M., of &c., [*mortgagor and vendor*], of the fifth part; and N. O., of &c., and P. Q., of &c., [*purchasers*], of the sixth part:

Recital of first lease.

WHEREAS, by an indenture, bearing date the 14th day of February, 1760, and made or expressed to be made between R. S. of the one part, and T. V. of the other part, for the considerations therein mentioned; the said R. S. did demise unto the said T. V., his executors, administrators, and assigns, [*parcels from the lease*], with their appurtenances: To hold the same unto the said T. V., his executors, administrators, and assigns, from the —— day of —— then last, for the term of 999 years, at the yearly rent of £——, and under and subject to the covenants, conditions, and agreements therein contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed and performed:

—of second lease.

AND WHEREAS &c. [*Recites in like manner an indenture, dated the 13th day of July, 1765, by which other property was demised for a term of 993 years*]:

—of the leases having become vested in the vendor's father.

AND WHEREAS, by divers mesne assignments and acts in the law, and ultimately by an indenture, bearing date the 8th day of May, 1824, and made or expressed to be made between [*parties*], the said premises by the said indenture of the 14th day of February, 1760, (*a*), [demised or expressed to be demised, became vested in A. M., (the father of the said L. M.), for the residue then to come of the said term of 999 years, and by divers other mesne assignments and acts in the law, and ultimately by the said indenture of the 8th day of May, 1824, the said premises, by] the said indenture of the 13th day of July, 1765, demised or expressed to be demised, became vested in the said A. M. for the residue then to come of the said term of 993 years:

—of settlement and mortgage.

AND WHEREAS &c. [*Recites an assignment dated the 14th day of January, 1828, made by the said*

(*a*) If the leases have always gone together in the mesne assignments and acts in the law, the word "and" may be substituted for those within the brackets; the word "respectively" being inserted before "demised."

LEASEHOLDS TO TENANTS IN COMMON.

A. M., *of the said premises comprised in the said terms respectively, to the said* A. B., *in trust for the said* A. M. *and his assigns, for his life, and after his death for the said* L. M., *his executors, administrators, and assigns; and recites a mortgage of the same premises, dated the —— day of ——, made by the said* L. M. *to the said* E. F., *subject to the life estate of the said* A. M., *and for securing* £1,800 *and interest*]: AND WHEREAS the said A. M. died in the month of ——, 1836: AND WHEREAS, by an indenture bearing date the 4th day of February, 1837, and made or expressed to be made between the said A. B. of the first part, the said E. F. of the second part, the said L. M. of the third part, the said G. H. and J. K. of the fourth part, and the said C. D. of the fifth part, after reciting to the effect hereinbefore recited, and after reciting that the said sum of £1,800 was still due on the aforesaid security, together with £470 for interest on the same up to the 10th day of January then last; and after reciting that the said L. M. was indebted to the said G. H. and J. K. in the sum of £6,000, secured on bonds executed to them by the said L. M., the one dated the 25th day of June, 1835, in the penalty of £5,000, and on which £2,000 was then due, the other dated the 3rd day of February, 1837, in the penalty of £8,000, and on which £4,000 was then due(*b*); and after reciting that the said L. M. had agreed to further secure to the said E. F. the said sums of £1,800 and £470, (making together the sum of £2,270), and to the said G. H. and J. K. the said sums of £2,000 and £4,000 in manner thereinafter mentioned, It was, by the said indenture now in recital, Witnessed, that, for the considerations therein mentioned, the said A. B., at the request of the said L. M.,

—of death of vendor's father.

—of mortgage to a trustee for two sets of mortgagees.

(*b*) In reciting a transfer of a mortgage, or a further charge, or the like, it is not usual to set forth the recital, which such instruments generally contain, that the existing mortgage debt then remained due, but that all interest on it had been paid. But if the instrument contains a recital that part of the debt had been paid off, or that interest was due, which was to be converted into principal, or a recital of any similar fact, varying the ordinary condition of the mortgage debt, it is the practice to state the fact so recited, as a recital of the deed which is itself in recital. (See supra, Introduction, p. 12).

LEASEHOLDS TO TENANTS IN COMMON.

and by the direction as well of the said E. F. as of the said G. H. and J. K., (testified as therein mentioned), did demise; and the said E. F., at such request as aforesaid, did assign, and the said L. M., by such direction as aforesaid, did demise and confirm unto the said C. D., his executors, administrators, and assigns, the said premises by the said indentures of the 14th day of February, 1760, and the 13th day of July, 1765, respectively demised, or expressed to be demised as aforesaid, To hold the same unto the said C. D., his executors, administrators, and assigns, for the residue then to come of the said terms of 999 years and 993 years respectively, except the last day thereof respectively, upon trust, in the first place, for better securing unto the said E. F., his executors, administrators, and assigns, the repayment of the said sum of £2,270, and interest thereon, after the rate of 5*l.* per cent. per annum, to be computed from the said 10th day of January then last, and, in the second place, for securing unto the said G. H. and J. K., their executors, administrators, and assigns, the repayment of the said sums of £2,000 and £4,000, and interest thereon after the rate aforesaid, and after payment of the said sums of £2,270 and £2,000 and £4,000, and the interest thereon, upon trust for the said L. M., his executors, administrators, and assigns:

—of the state of the mortgage debts.

AND WHEREAS the whole of the said sum of £2,270, and £30 for interest thereon, (making together the sum of £2,300), are now due and owing to the said E. F. on his said securities; and the said sums of £2,000, and £4,000, and £100 for interest thereon, are now due and owing to the said G. H. and J. K., on their said securities:

—of contract for sale.

AND WHEREAS the said L. M. hath contracted and agreed with the said N. O. and P. Q., for the sale to them of the said pieces or parcels of land, messuages, and premises comprised in the said indentures of the 14th day of February, 1760, and the 13th day of July, 1765, respectively, for the residue now to come of the said terms of 999 years and 993 years respectively, at or for the price or sum of £3,300; and it has been agreed that the said sum of £3,300 shall be paid to the persons and in manner hereinafter mentioned; and the said N. O. and P. Q. are desirous that the said purchased premises shall be assigned to them in manner here-

inafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and and in consideration of the sum of £2,300, part of the said sum of £3,300, at or immediately before the sealing and delivery of these presents to the said E. F., paid by the said N. O. and P. Q., at the request and by the direction of the said L. M., and with the privity and consent of the said G. H. and J. K., (testified by their severally being parties to and executing these presents), (the receipt of which said sum of £2,300, he, the said E. F., doth hereby admit and acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said N. O. and P. Q., and also the said L. M., and every of them, their and every of their heirs, executors, administrators, and assigns, for ever by these presents, and doth declare the same to be in full discharge of all principal monies and interest due or owing to him the said E. F. upon his said securities); and in consideration of the further sum of £1,000, the remainder of the said sum of £3,300 at the same time paid by the said N. O. and P. Q. to the said G. H. and J. K., at the like request and by the like direction of the said L. M., (testified as hereinbefore is mentioned), (the receipt of which said sum of £1,000, they, the said G. H. and J. K., do hereby admit and acknowledge, and of and from the same and every part thereof do, and each of them doth acquit, release, and discharge the said N. O. and P. Q., and also the said L. M., and every of them, their and every of their heirs, executors, administrators, and assigns for ever, by these presents, and do declare the said sum of £1,000 to be in part discharge of the monies due and owing to them on their said securities; and the payment, in manner aforesaid, of which said sums of £2,300, and £1,000, making together the said sum of £3,300, he, the said L. M., doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said N. O. and P. Q., and each of them, their and each of their heirs, executors, administrators, and assigns for ever, by these presents, and doth declare the same to be in full for the purchase of the

LEASEHOLDS TO TENANTS IN COMMON.

Witnesseth.

Consideration.

Receipt.

Further consideration.

Receipt.

LEASEHOLDS TO TENANTS IN COMMON.

Assignment.

said premises), he, the said A. B., at the request and by the direction of the said L. M., (testified by his being a party to and executing these presents), hath assigned, and by these presents doth assign, and the said C. D., at the like request and by the like direction of the said L. M., (testified as aforesaid), and with the privity and consent, as well of the said E. F. as of the said G. H. and J. K., (testified by their severally being parties to and executing these presents), hath assigned and surrendered, and by these presents doth assign and surrender, and the said E. F., and also the said G. H. and J. K. have, and each of them hath, assigned and released and quit claimed, and by these presents do and each of them doth assign and release, and quit claim; and the said L. M. hath assigned and confirmed, and by these presents doth assign and confirm, unto the said N. O. and P. Q., their executors, administrators, and assigns, ALL THOSE, the pieces or parcels of ground, messuages, hereditaments, and premises, by the said indentures of the 14th day of February, 1760, and the 13th day of July, 1765, respectively demised, or expressed to be demised as aforesaid, with all erections and buildings since erected and built upon the same premises, and every part thereof, and with their and every of their rights, easements, and appurtenances, AND ALL THE ESTATE, right, title, interest, term and terms for years, property, possibility, claim, and demand whatsoever, both at law and in equity, of them the said A. B., C. D., E. F., G. H., J. K., and L. M., and every of them, in, to, out of, or upon the same premises, or any of them, or any part thereof: TO HAVE AND TO HOLD the said pieces or parcels of ground, messuages, erections, buildings, and hereditaments, and all and singular other the premises hereinbefore assigned or expressed, and intended so to be, unto the said N. O. and P. Q., their executors, administrators, and assigns, from henceforth in equal shares as tenants in common: AS TO SUCH parts of the said premises as were comprised in the said indenture of the 14th day of February, 1760, for the residue now to come of the said term of 999 years granted by the same indenture, at the rent, and under and subject

Parcels.

And all the estate.

Habendum.

—to purchasers as tenants in common.

to the covenants, conditions, and agreements, by and in the same indenture reserved and contained, and on the part of the lessee, his executors, administrators, or assigns, to be paid, observed, and performed; AND AS TO SUCH parts of the said premises, as were comprised in the said indenture of the 13th day of July, 1765, for the residue now to come of the said term of 993 years granted by the same indenture, at the rent, and under and subject to the covenants and agreements by and in the same indenture reserved and contained, and on the part of the lessee, his executors, administrators, or assigns, to be paid, observed, and performed; AND AS TO ALL and singular the said premises hereinbefore assigned or expressed, and intended so to be, freed and absolutely discharged from the said sums of £2,270, £2,000, and £4,000, respectively, secured by the said indenture of the 4th day of February, 1837, and all interest for the same respectively, and all claims and demands of the said E. F., G. H., and J. K., or any of them, in, to, out of, or upon, the same premises, or any of them, or any part thereof: AND EACH OF THEM, the said A. B., C. D., E. F., G. H., and J. K., so far as relates to his own acts and deeds only, doth hereby for himself, his heirs, executors, and administrators, covenant with each of them, the said N. O. and P. Q., his executors, administrators, and assigns (*c*), that they, the said A. B., C. D., E. F., G. H.,

LEASEHOLDS TO TENANTS IN COMMON.

—freed from mortgages.

Covenants by the trustees and mortgagees against incumbrances.

(*c*) When the covenantees are tenants in common, the covenants should be entered into with them severally, for their interests are several and distinct. And it might, perhaps, be correct to confine the several covenants to the undivided shares taken by the respective covenantees, because that appears to be the practical effect of the covenants. If the interest conveyed be freehold, and be conveyed by lease and release, the covenants should be entered into with the releasee, it being considered that the effect of the statute of uses is to distribute the benefit of covenants made with the releasee, in due proportion to all the cestuis que use.

Covenants with tenants in common.

The questions relating to covenants with tenants in common are extremely unsettled and difficult. It is clear, however, that the nature of the interests of the covenantees are more to be considered than the mere words of the covenant, in determining whether the covenant is joint or several. Thus, if a man covenant with two or more jointly, and the interest and cause of action of the covenantees be several, and not joint, the

LEASEHOLDS TO TENANTS IN COMMON.

and J. K., respectively &c., [*Covenants against incumbrances, see supra*, p. 241]: AND THE SAID L. M. doth

Covenants by vendor.

hereby for himself, his heirs, executors, and administrators, covenant with each of them, the said N. O. and P. Q., his executors, administrators, and assigns, that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said L. M. made, done, &c., [*Covenants that the leases respectively are in force—that the respective rents and covenants have been paid and performed up to the date of the assignment—for right to assign surrender and release—for quiet enjoyment—free from incumbrances—and for further assurances. See supra, pp. 263 and 336*]: AND THEY, the said N. O. and P. Q., do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators (*d*), covenant with the said A. B., his executors and administrators, and also as a separate covenant with the said L. M., his executors and

Covenants by purchaser to pay rent and perform covenants.

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covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. (*Eccleston* v. *Clipsham*, 1 Wms. Saund. 153, n. (1)). And if a covenant be made with several covenantees, *and each of them*, there, if the interests of the covenantees be several, the covenants are several; but, if the interests are joint, the covenant is joint. (*Slingsby's case*, 5 Rep. 18 b; 1 Wms. Saund. 155, n. (1). See further, *Southcote* v. *Hoare*, 3 Taunt. 87; *James* v. *Emery*, 8 Taunt. 245; S. C. 2 J. B. Moore, 195; *Withers* v. *Birchman*, 3 B. & C. 254; S. C. 5 Dow. & Ry. 106; *Anderson* v. *Martindale*, 1 East, 497; *Lane* v. *Drinkwater*, 1 Cro. Mee. & Ros. 599; *Lee* v. *Nixon*, 1 Ad. & Ell. 201; *Servante* v. *James*, 5 Man. & Ry. 299; *Simpson* v. *Clayton*, 4 Bing. N. C. 758, 781. See too, ante, Vol. 1, Art. COVENANTS.

Covenants by purchasers as tenants in common.

(*d*) It is a question whether the vendor is entitled to a joint, or a joint and several covenant from the purchasers, for payment of the rent and performance of the covenants, or whether the liability of each purchaser ought not to be limited in proportion to the share which he takes in the property. As, however, the tenancy in common is created for the convenience of the purchasers, and not of the vendors, it would seem that the vendor is entitled to a joint covenant at least, even if not to the additional several covenants. He ought not to be obliged to bring two actions on each breach of the covenant, and he ought to be able to compel either party to save him harmless, even if the co-tenant cannot be found, or is not a responsible person.

administrators, that they, the said N. O. and P. Q., or one of them, their or one of their executors, administrators, or assigns, shall and will henceforth, from time to time, and at all times during the continuance of the said terms of 999 years and 993 years respectively, pay the said yearly rents of £ —— and £ ——, by the said indentures of the 14th day of February, 1760, and the 13th day of July, 1765, respectively reserved and henceforth to become payable, and observe and perform all and every the covenants, conditions, and agreements, in the same indentures respectively contained, and on the part of the respective lessees, their respective executors, administrators, or assigns, henceforth to be observed or performed; and shall and will, from time to time and at all times hereafter, save, defend, keep harmless and indemnified, each of them, the said A. B. and L. M., and each of their executors and administrators, of, from, and against all actions, suits, damages, costs, expenses, claims, and demands, for or by reason or on account of the nonpayment of the said rents, or either of them, or any part thereof respectively, or the breach, or non-observance, or non-performance of the said covenants, conditions, or agreements, or any of them. IN WITNESS &c.

LEASEHOLDS TO TENANTS IN COMMON.

and indemnify vendor and his trustee.

XXXIX.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

CONVEYANCE *to uses in favour of a* HUSBAND *and* WIFE, *of* FREEHOLDS, LEASEHOLDS, *and* COPYHOLDS, *where the Lands of different Tenures cannot be distinguished, and* PART *of the* PURCHASE-MONEY *is advanced by* MORTGAGEES. DECLARATION *that the* LAND *is to be the* PRIMARY *Resort for Payment of the* MORTGAGE.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., widow, [*vendor*], of the first part; C. D., of &c., widow, [*a party joining to release a claim*], of the second part; E. F., of &c., [*purchaser*]; and A. F., his wife, of the third part; G. H., of &c.; I. K., of &c.; and L. M., of &c., [*mortgagees*], of the fourth part; and N. P., of &c., and Q. R., of &c., [*trustees*], of the fifth part, [*recites a lease of the 11th of October, 1807, from X. Y. to J. B., for fifty-one years, at a peppercorn-rent, with a covenant for conveyance, in certain events, of the fee-simple of the land demised*]: AND WHEREAS the said J. B., being seised or entitled for an estate of inheritance, in fee-simple, of or to the capital messuage or mansion-house, lands, and other freehold hereditaments, hereinafter particularly mentioned, and intended to be hereby released, (except such of the same hereditaments as were purchased, or taken in exchange, by the said testator, after the execution of his will, hereinafter recited, and before the execution of his codicil, also hereinafter recited), and being also possessed or entitled, under or by virtue of the said indenture of the 11th day of October, 1807, for the residue then to come of the said term of fifty-one years, of or to the said piece of ground, by the same indenture demised, as hereinbefore

Recital of lease.

—of a will.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

is mentioned, and to the benefit of the said hereinbefore recited covenant in the same indenture contained, and being also seised and entitled to him and his heirs for an estate of inheritance, according to the customs of the manors of which the same are respectively holden, of or to the copyhold lands and hereditaments hereinafter particularly mentioned and covenanted to be surrendered, and having duly surrendered the same copyhold hereditaments, respectively, to the use of his will (*a*), duly made, signed, and published his last will and testament, in writing, bearing date the —— day of ——, and thereby (among other things), gave and devised unto the said A. B., then his wife, ALL that his mansion-house, situate and being at ——, with ——, and all other his real estate in —— aforesaid, or near thereto, with the appurtenances, to hold the same to her the said A. B., her heirs and assigns for ever; and the said testator, after bequeathing several specific parts of his personal estate and effects, directed that all the residue of his personal estate and effects, which should remain after payment and satisfaction of his funeral and testamentary expenses and debts, should be employed and vested at interest, during his wife's life, by W. L. and M. T., in their or one of their names, in government or real securities, and the clear interest, dividends, and produce therefrom arising, he willed and directed, should be paid to his said wife and her assigns, during her life, and at her decease, he gave and bequeathed the principal money, and such interest and dividends as should be then due and owing for the same and unpaid, unto his two daughters, the said C. D. and E. B., equally to be divided between them; AND the said testator did thereby appoint the said A. B. and W. L. executrix and executor of his said will: AND

—and codicil.

(*a*) The words, "and having duly surrendered the same copyhold hereditaments respectively to the use of his will," are not applicable, and should be omitted where the will has been made since the passing of the statute 55 Geo. 3, c. 192, which has rendered a surrender to the use of the will unnecessary. (See 1 Powell on Devises, by Jarman, p. 45, n. (8); Ibid. Vol. ii. p. 121. See, too, statute, 1 Vict. c. 26, s. 3).

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

WHEREAS the said J. B. duly made, signed, and published a codicil, bearing date the —— day of ——, to his said will; and thereby gave and devised unto the said A. B. and her heirs, all such lands and tenements in —— aforesaid, or near thereto, as had been purchased by or taken in exchange by him, since the making of his said will; and he did earnestly recommend his said wife to make such disposition of his property she would have a power to dispose of, as would make the fortunes of his two daughters, with what he had given them in his life, or by his will, equal; but that she would secure £6,000, part of his daughter C. D.'s fortune, for the benefit of her three children, in equal shares, payable at such time and in such manner as his said wife should think fit to direct; the residue of his daughter C. D.'s fortune, or share, being left subject to her own disposal; and the said testator confirmed his said will in all other respects: AND WHEREAS the said testator died in or about the month of ——, without having revoked or altered his said will, except so far as the said will is revoked or altered by the said codicil, and without having revoked or altered his said codicil, and leaving the said C. D. and E. B., his only children and co-heiresses at law: AND WHEREAS the said will and codicil were, on the —— of ——, proved by the said A. B. and the said W. L., in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS the said E. B. died on or about the —— day of ——, intestate, and without having been married, and leaving the said C. D. her only sister and heiress at law, and the said A. B. and C. D. her next of kin; and letters of administration of the goods and chattels, rights and credits of the said E. B., have since been granted by the Prerogative Court of the Archbishop of Canterbury to the said A. B.: AND WHEREAS the said E. F. hath contracted and agreed with the said A. B. for the absolute purchase of the said capital messuage, lands, and other freehold hereditaments, hereinafter particularly mentioned, and intended to be hereby released, with the appurtenances and the inheritance thereof in fee-simple, in possession, free from incumbrances, and also of the said piece of ground

—death of testator leaving two daughters.

—of probate of will and codicil.

—of death of one daughter.

—and administration to her.

—of agreement for purchase.

and premises comprised in the said indenture of the 11th day of October, 1807, for the residue of the said term of fifty-one years, with the full benefit of the said hereinbefore recited covenant contained in the same indenture, subject to the covenants and agreements in the same indenture contained, on the part of the lessee, his executors, administrators, or assigns, to be observed and performed, but free from all other incumbrances, and of the copyhold messuages, lands, and hereditaments hereinafter particularly mentioned, and covenanted to be surrendered, with the appurtenances and the inheritance thereof, according to the custom of the manor of which the same are respectively holden, free from incumbrances, except the rents, heriots, fines, suits, and services, therefore due and of right accustomed, at or for the price or sum of £5,000: AND WHEREAS it is apprehended that the recommendation contained in the said codicil to the said will of the said J. B., amounts to a trust (*b*), in favour of the said C. D. and E. B., and the said children of the said C. D., and doubts have been entertained whether the said piece of ground so demised by the said X. Y. to the said J. B., for the term of fifty-one years, as hereinbefore is mentioned, passed under the aforesaid devise, contained in the said will, to the said A. B., or was comprised in the bequest or disposition made by the said J. B., in and by his said will, of the general residue of his personal estate: AND WHEREAS, in compliance with the said recommendation in that behalf, the said A. B., by an indenture bearing date the —— day of ——, and made or expressed to be made between [*parties*], hath settled the sum of £6,000 on the said C. D. and her three children, as in the said codicil is directed: AND WHEREAS, in consideration of the natural

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

—of doubts on the construction of the will and codicil.

—of a settlement in consequence.

—and of an agreement by C. D., to join

(*b*) As to the cases in which words of recommendation amount to a trust, see 1 Powell on Devises, by Jarman, 355; *Sale* v. *Moore*, (1 Sim. 534); *Meredith* v. *Heneage*, (1 Sim. 542); *Foley* v. *Parry*, (2 My. & Ke. 139); *Lechmere* v. *Lavie*, (2 My. & Ke. 197); *Lawless* v. *Shaw*, (1 Lloyd & Goold, 154); Ex parte *Payne*, (2 You. & Col. 636); *Podmore* v. *Gunning*, (7 Sim. 644).

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

love and affection which the said C. D. bears towards the said A. B., and for enabling the said A. B. to make a perfect title to the said hereditaments and premises so agreed to be sold to the said E. F. as aforesaid, the said C. D. has agreed to join with the said A. B. in the conveyance and assignment hereinafter contained, and also to release the said copyhold hereditaments in manner hereinafter mentioned: AND WHEREAS the said E. F. having occasion for the sum of £2,000 in order to complete the said purchase, the said G. H., I. K., and L. M. have agreed at his request to advance and lend him the same out of monies belonging to them on a joint account (*c*), on having the repayment thereof, with interest in the meantime, secured in manner hereinafter mentioned: AND WHEREAS, for the purposes of the act of Parliament imposing an ad valorem duty on conveyances on the sale of land or other property, it hath been agreed that the sum of £——, part of the said purchase-money of £5,000, shall be the consideration for the purchase of the said freehold and leasehold hereditaments, and that the sum of £——, residue of the said sum of £5,000, shall be the consideration for the purchase of the said copyhold or customary hereditaments (*d*): AND WHEREAS the said E. F., in consideration of his love and affection for the said A. F., his wife, and for other good causes and considerations, is desirous, that, subject to the security intended to be hereinafter made to the said G. H., I. K., and L. M., for the said sum of £2,000 and interest, the said hereditaments should be settled to the uses, upon the trusts, and in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £2,000, at or immediately before the sealing and delivery of these presents to the said A. B. paid by the said G. H., I. K., and L. M., out of

in the conveyance.

—of agreement for mortgage.

—of apportionment of purchase-money for stamp duty.

—of purchaser's desire to have the estate settled.

Witnesseth.

Consideration.

(*c*) With respect to the effect and meaning of these words, see infra, Precedent LIV., n. (*a*).

(*d*) See ante, p. 104, n. (b); and the Stamp Act, 55 Geo. 3, c. 184, Schedule, Art. Conveyance.

monies belonging to them upon a joint account, and at the request and by the direction of the said E. F., (testified by his being a party to and executing these presents), the payment of which said sum of £2,000 the said E. F. doth hereby acknowledge, (and of and from the same and every part thereof doth acquit, release, and discharge the said G. H., I. K., and L. M., and every of them, their and every of their heirs, executors, and administrators, for ever, by these presents), and also in consideration of the sum of £3,000, at the same time to the said A. B. paid by the said E. F., (the receipt of which said sums of £2,000 and £3,000, making together the said purchase-money or sum of £5,000, the said A. B. doth hereby acknowledge, and of and from the same respectively, and every part thereof respectively, doth acquit, release, and discharge the said E. F., and also the said G. H., I. K., and L. M., and every of them, their, and every of their heirs, executors, administrators, and assigns, for ever, by these presents), she the said A. B., at the request and by the direction of the said E. F., and of the said G. H., I. K., and L. M., (testified by their severally being parties to and executing these presents), hath granted, aliened, released, and confirmed, and by these presents doth &c., and the said C. D., at the request as well of the said A. B. as of the said E. F., G. H., I. K., and L. M., (testified, &c.), hath remised and released, and by these presents doth remise and release unto the said N. P. and Q. R., (in their actual possession now being by virtue of a bargain and sale thereof to them made by the said A. B. and C. D., in consideration of 5*s.* a piece, *see supra*, p. 198:) ALL THAT &c. [*ancient description of freehold parcels*], ALL which messuages or tenements, pieces or parcels of land, and other hereditaments, hereinbefore particularly mentioned, together with the hereditaments comprised in the said indenture of the 11th day of October, 1807, and the copyhold or customary hereditaments hereinafter particularly mentioned, and covenanted to be surrendered, are now commonly called or known by the several names or descriptions, and contain by admeasurement the several

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

Further consideration.

Receipt.

Conveyance.

Parcels.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

quantities, (be the same respectively more or less), next hereinafter mentioned, (that is to say), [*modern description of parcels*]: AND ALL SUCH other part or parts (if any) of the said capital messuage or mansion-house, and other hereditaments, as are of freehold tenure (*e*), [*general words*], but save and except out of this present conveyance such part and parts, if any, of the same premises as are of copyhold or customary tenure: TO HAVE AND TO HOLD the said capital messuage, or mansion-house, lands, hereditaments, and all and singular other the premises hereby granted and released, or expressed and intended so to be, unto the said N. P. and Q. R., and their heirs, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, hereinafter declared or contained, of or concerning the same, (that is to say): To the use of the said G. H.,

Habendum.

To use of mort-

Description of parcels when lands of different tenures are intermixed.

(*e*) It is a matter of constant occurrence, especially in the counties of Norfolk and Suffolk, that lands of freehold and customary tenure become so blended together that the freehold cannot be distinguished from the customary lands. (See ante, Vol. 1, pp. 78, 220; and supra, p. 67). In this case some such mode of description must be resorted to as that employed in the text. One plan in very common use is to grant and release "All such and so many, and such part and parts as are of freehold tenure of the lands and hereditaments hereinafter particularly mentioned, (that is to say), All that, &c.:" using the modern general description alone or adding the ancient freehold description, as circumstances seem to require. The covenant to surrender then runs, "That he, the said [*surrenderor*], or his heirs, shall and will, at or before the next court to be holden in and for the said manor of ——, at the costs &c., surrender, &c., (supra, p. 308), All such and so many, and such part and parts of the said lands and hereditaments hereinbefore particularly mentioned, as are of customary tenure and holden of the said manor of ——, and shall and will, &c." [*Repeating the same form for every manor of which any of the hereditaments are understood to be held, and adding general words*]. "To the use of the said [*surrenderee*], his heirs and assigns, to be holden according to the custom of the said several manors, of which the same premises are respectively holden, and under the suits, services, rents, fines, and heriots, therefore respectively due and of right accustomed."

Of course, if it should happen that leaseholds have become undistinguishably intermixed with freeholds or copyholds, a similar device will be adopted for the description in the conveyance.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

I. K., and L. M., their executors, administrators, and assigns, for the term of 500 years, to commence and be computed from the day next before the day of the date of these presents, and thenceforth next ensuing and fully to be complete and ended, without impeachment of waste, subject nevertheless to the proviso or condition, hereinafter contained, for making void the same term; AND FROM and immediately after the expiration or sooner determination of the said term of 500 years, and in the meantime subject thereto, to such uses, upon such trusts, and to and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as the said E. F. and A. F. shall by any deed or deeds, with or without power of revocation and new appointment, from time to time, jointly direct, limit, or appoint, AND IN DEFAULT of, and until such direction, limitation, or appointment, and so far as no such direction, limitation, or appointment shall extend to the use of the said E. F. and his assigns for his life, without impeachment of waste; AND FROM and after the death of the said E. F., to the use of the said A. F. and her assigns for her life, without impeachment of waste, AND FROM and after the death of the said A. F., to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as the said A. F. shall at any time or times, either during the lifetime of the said E. F., or after his death, and whether she shall be married or single, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, or by her last will and testament, or any codicil thereto, or any writing in the nature of or purporting to be her last will and testament, or any codicil thereto, direct, limit, or appoint, and in default of any such direction, limitation, or appointment, as last aforesaid, and so far as no such direction, limitation, or appointment, shall extend, to the use of the said A. F., her heirs and assigns, for ever: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, they the said A. B. and C. D., at the request and by the

Mortgagees for term of 500 years.

—and subject thereto to uses in favour of purchaser and wife.

Witnesseth, Secondly,—assignment of leaseholds.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

direction of the said E. F., (testified as hereinbefore is mentioned), have and each of them hath assigned, and by these presents do and each of them doth assign, unto the said G. H., I. K., and L. M., their executors, administrators, and assigns, ALL AND SINGULAR the said piece of ground and other hereditaments, in and by the said indenture of the 11th day of October, 1807, demised, or expressed and intended to be demised, to the said J. B., his executors, administrators, and assigns, for the said term of fifty-one years, as hereinbefore is mentioned, with the appurtenances, together with the full benefit of the said covenant entered into by the said X.Y., as aforesaid, AND ALL the estate, &c.,

Parcels.

Habendum.

TO HAVE AND TO HOLD the said piece of ground and hereditaments, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said G. H., I. K., and L. M., their executors, administrators, and assigns, for all the residue now to come of the said term of fifty-one years, under and subject, nevertheless, to the observance and performance of the covenants and conditions in the said indenture of the 11th day of October, 1807, contained, and on the part of the lessee, his executors, administrators, and assigns, henceforth to be observed and performed, and also to the proviso or condition hereinafter contained for redemption of the same premises:

Proviso for redemption.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of them, and of these presents, nevertheless, is, that if the said E. F. and A. F., or either of them, or their appointees, or the appointees, heirs, executors, administrators, or assigns, of the said A. F. (*f*), shall and

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Shape of the proviso, when the equity of redemption is settled.

(*f*) In the case in the text, the settlement of the equity of redemption is so simple, that the proviso for redemption can without difficulty express the parties who are to have the right to redeem. But, if the settlement be complex, the form should be, "That if the said [*mortgagor*], or any other person or persons interested in the equity of redemption of the said premises, shall do, &c." When, as in the text, the proviso is simply for cesser of a term, no further observation is required; but if a reconveyance is provided for, it should be engaged to be made, "upon the request and at the costs of the said [*mortgagor*], or any other person or persons in

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

do pay, or cause to be paid, to the said G. H., I. K., and L. M., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £2,000, &c., [*see infra, Precedent LIV.*], then and in such case, and from and immediately after such payment shall be so made as aforesaid, the said term of five hundred years shall cease, determine, and be absolutely void, to all intents and purposes whatsoever, and the said G. H., I. K., and L. M., or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns, shall and will at any time after such payment shall be so made as aforesaid, upon the request, and at the proper costs and charges of the said E. F. and A. F., or either of them, or other the person or persons aforesaid, assign the said piece of ground, and other hereditaments and premises hereinbefore assigned, or expressed and intended so to be, unto the said N. P. and Q. R., their executors, administrators, and assigns, for the residue which shall be then to come of the said term of fifty-one years, to the intent that the same may be held by them upon such trusts as shall or may as nearly correspond with, and be similar to, the uses hereinbefore declared or limited of and concerning the said capital messuage and other freehold hereditaments hereinbefore granted and released, or expressed and intended so to be, as the different nature and tenure of the property, and the rules of law and equity, will permit: AND FOR the considerations aforesaid, it is hereby agreed and declared, between and by the parties to these presents, that the reversion, freehold, and inheritance of and in the said piece or parcel of ground, hereditaments, and premises, comprised in the said indenture of the 11th day of October, 1807, as aforesaid, shall be conveyed by the said X. Y., his heirs or assigns, pursuant to the said covenant in that behalf in the same indenture contained, to the uses, upon and for the

Declaration that the reversion of the leaseholds is to be conveyed to uses declared of freeholds.

terested in the equity of redemption of the said premises:" and "to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject, to which the equity of redemption of the same premises shall for the time being stand limited and settled." See infra, Precedent LVII.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinbefore limited, expressed, or declared, of or concerning the said hereditaments hereinbefore granted and released, or expressed and intended so to be, or as near thereto as the deaths of parties and other circumstances will admit of: AND THIS INDENTURE ALSO WITNESSETH,

Witnesseth, Thirdly,—covenant to surrender copyholds.

that, in further pursuance of the said agreements, and for the considerations aforesaid, the said A. B., at the request and by the direction of the said E. F., and with the privity and approbation of the said G. H., I. K., and L. M., (testified as hereinbefore is mentioned), doth hereby for herself, her heirs, executors, and administrators, covenant with the said N. P. and Q. R., and their heirs, that the said A. B., or her heirs, shall and will, at or before the next courts to be holden in and for the respective manors of which the same are respectively holden, at the costs and charges of the said E. F. or his heirs, well and effectually surrender, or cause and procure to be surrendered, into the hands of the lord or lady, lords or ladies of the same manors, respectively, according to the customs thereof, respectively, ALL THAT, &c. [*copyhold parcels*], and also all such other, if any, of the said hereditaments hereinbefore particularly mentioned, and the freehold and leasehold parts whereof are hereinbefore granted and released and assigned respectively, or expressed and intended so to be, as are of copyhold tenure [*general words*], TO THE USE of the said N. P. and Q. R., their heirs and assigns, according to the several customs of the said manors whereof the same premises are respectively holden, and to be holden by and under the suits and services, rents, fines, and heriots therefore respectively due and of right accustomed, IN TRUST, nevertheless, and to the intent, that they the said N. P. and Q. R., their heirs or assigns, shall and do at the same courts, respectively, at the costs and charges of the said E. F. or his heirs, well and effectually surrender, or cause to be surrendered, into the hands of the lord or lady, lords or ladies of the same manors, respectively, according to the customs thereof, respectively, the said lands, hereditaments,

Copyhold parcels.

To the use of trustees.

In trust to surrender to mortgagees.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

and premises hereinbefore covenanted to be surrendered to the use of the said G. H., I. K., and L. M., their heirs and assigns, but with a condition for making void the same surrender on payment by the said N. P. and Q. R., their heirs or assigns, or the said E. F. and A. F., or either of them, or their appointees, or the appointees, heirs, executors, administrators, or assigns of the said A. F., unto the said G. H., I. K., and L. M., their executors, administrators, or assigns, of the said sum of £2,000, and the interest thereof, on or at the days or times, and in the manner, hereinbefore mentioned and appointed for the payment of the same respectively: AND IT IS HEREBY agreed and declared between and by the parties to these presents, that, subject to the conditional surrender so to be made to the use of the said G. H., I. K., and L. M., their heirs and assigns, as aforesaid, the said N. P. and Q. R., their heirs and assigns, shall stand and be seised of and interested in the said lands, hereditaments, and premises hereinbefore covenanted to be surrendered, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and agreements, as shall or may as nearly correspond with and be similar to the uses, trusts, intents, purposes, powers, provisoes, and agreements hereinbefore expressed and contained, of and concerning the freehold messuage or mansion-house, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, (except the said term of five hundred years hereinbefore limited to the said G. H., I. K., and L. M., their executors, administrators, and assigns), as the different natures and tenures of the property, and the rules of law and equity, will permit: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, she the said C. D. hath remised, released, and for ever quit claimed, and by these presents doth &c., unto the said N. P. and Q. R., their heirs and assigns, all the estate, right, title, interest, property, claim, and demand, both at law and in equity, which she the said C. D. now hath, or which she or her heirs can, shall, or may, or otherwise could

Declaration that, subject to mortgage, copyholds are to follow uses of freehold.

Witnesseth, Fourthly,—release by C. D., of a claim on the copyholds.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

or might at any time or times hereafter, have, claim, challenge, or demand, of, in, to, or out of the said hereditaments and premises hereinbefore covenanted to be surrendered, or any of them, or any part thereof: AND THE SAID A. B. doth hereby, for herself, her heirs, executors, and administrators, covenant with the said N. P. and Q. R., their heirs and assigns, and also as a separate covenant, and so far as relates to the said leasehold hereditaments, with the said G. H., I. K., and L. M., their executors, administrators, and assigns, in manner following, (that is to say), that, for and notwithstanding any act, &c., by the said A. B. and C. D., or either of them, or the said J. B., made, &c., they the said A. B. and C. D., or one of them, at the time of the sealing and delivery of these presents, are or is, &c. [*seised of freeholds and copyholds: supra, p.* 326]; and that for and notwithstanding, &c. [*that the lease is valid, and the rents and covenants paid and performed; supra, p.* 336]; and that for and notwithstanding, &c., they the said A. B. and C. D., or one of them, now have or hath in themselves or herself, &c. [*right to convey the freeholds; supra, p.* 327]—*to assign the leaseholds; supra, p.* 336—*and to surrender the copyholds; supra, p.* 327, *inserting* "upon the trusts" *before* "in manner aforesaid:" AND THAT, &c. [*for quiet enjoyment—free from incumbrances—and for further assurance; supra, p.* 327—*extending the covenants so as to apply to A. B., C. D., and J. B., as above*:]

Covenants for title.

Mortgage covenants.

AND THE SAID E. F., &c. [*covenant with G. H., I. K., and L. M., their executors, administrators, and assigns, for payment of the mortgage money; supra, p.* 330—*and see the proviso for redemption, supra, p.* 356—*for quiet enjoyment by G. H., I. K., and L. M., their heirs, executors, administrators, and assigns, after default—free from incumbrances, and for further assurance—proviso for quiet enjoyment until default* "by the said E. F., or other the person or persons for the time being entitled to the equity of redemption of the said mortgaged premises;" *supra, p.* 330, *extending the covenants and provisoes so as to include the leaseholds*:]

Declaration.

AND lastly, the said E. F. doth

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS, TO MORTGAGEES AND PURCHASERS.

hereby declare, and the true intent and meaning of him and of these presents is, that, notwithstanding the covenant hereinbefore entered into by the said E. F., for the payment of the said sum of £2,000, and the interest thereof, the said freehold, leasehold, and copyhold hereditaments and premises hereinbefore released and assigned, and covenanted to be surrendered, respectively, shall, as between the said E. F., his heirs, executors, or administrators, and the person or persons for the time being entitled to the equity of redemption of the said premises, be primarily liable to, and remain charged with, the payment of the said sum of £2,000, and the interest thereof. IN WITNESS, &c.

that land is to be the primary resort for payment of the mortgage money.

XL.

ASSIGNMENT *of* LETTERS PATENT (*a*).

LETTERS PATENT.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*assignor*], of the one part; and C. D., of &c. [*assignee*], of the other part; WHEREAS the said A. B., by his petition to the Queen's most excellent Majesty, represented, (among other things), that in consequence of a communication made to him by the said C. D., a foreigner, residing abroad, he, the said A. B., was in possession of a method of making

Parties.

Recital of petition for Letters Patent.

(*a*) Some information with regard to the law of patents will be found in the notes to Precedent XV., ante, p. 182.

Letters patent always contain a clause for making the liberties and advantages granted by them void, if the benefit of the patent should become divided or shared amongst more than five persons or their representatives at one time. (See *Duvergier* v. *Fellows*, 5 Bing. 248; S. C. 2 Moo. & Pay. 384; 10 B. & C. 286; 1 Clark & Fin. 39). But this provision applies only to assignments by act of the party, and not to assignments by act of law,—as by a fiat in bankruptcy. (*Bloxam* v. *Elsee*, 6 B. & C. 169).

Patent not to be vested in more than five persons at once.

LETTERS PATENT.

or manufacturing an improved machine or instrument for calculating and ascertaining the longitude at sea, and that the same was then in the kingdom, and had not been used therein by any other person, and therefore prayed to have granted to him, the said A. B., his executors, administrators, and assigns, the Queen's royal letters patent, under the great seal of the United Kingdom, for the sole use, benefit, and advantage, of the said invention within England, Wales, and the town of Berwick-upon-Tweed, for the term of fourteen years (*b*): AND WHEREAS, by letters patent under the great seal of the United Kingdom, bearing date the —— day of ——, after reciting therein the said petition, her Majesty did for herself, her heirs, and successors, give and grant unto the said A. B., his executors, administrators, and assigns, especial license, full power, sole privilege, power, and authority, for him, his executors, administrators, and assigns, deputies, servants, or agents, and no others, to make up, exercise, and vend the said invention within England, Wales, and Berwick-upon-Tweed: AND WHEREAS the said A. B. hath acknowledged a specification of the said invention, and the same hath been duly inrolled in her Majesty's High Court of Chancery, the —— day of this instant month of —— (*c*): AND WHEREAS the said letters patent were obtained by the said A. B. on behalf of the said C. D., and the said A. B. hath no claim to the said invention or discovery, in respect of which the said letters patent were granted: AND WHEREAS the said C. D. is desirous that the said A. B. should assign the said letters patent, and the full benefit thereof unto him, the said C. D., his executors, adminis-

—of the grant of the same.

—of acknowledgment and inrolment of specification.

—of assignor being a trustee for assignee.

—of assignee's desire to have an assignment of the patent.

Recitals in assignment of patent.

(*b*) An assignment of letters patent should commence with reciting the petition for the grant, and not with a recital that the assignor has invented the subject of the patent. (See *Bowman* v. *Taylor*, 2 Ad. & Ell. 278; ante, p. 184, n. (*b*), and p. 192, n. (*b*). If it be deemed more convenient, the petition may be given as a recital in the letters patent, or may be omitted, if the grant itself should describe the alleged invention without reference to the petition.

(*c*) See ante, p. 185, n. (*c*).

trators, and assigns, in manner hereinafter mentioned (*d*): NOW THIS INDENTURE WITNESSETH, that for effectuating the said desire, and in consideration of the premises, he, the said A. B., hath assigned, and by these presents doth assign, unto the said C. D., his executors, administrators, and assigns, ALL THOSE, the said letters patent hereinbefore mentioned, and the exclusive exercise, right, and enjoyment thereby granted or expressed, and intended so to be, of the said invention in the said petition and letters patent mentioned: AND ALL and singular the powers, authorities, liberties, privileges, profits, emoluments, and advantages whatsoever, appertaining or belonging thereunto, or in anywise to be had or made therefrom (*e*),

LETTERS PATENT.

Witnesseth assignment.

—of the patent.

(*d*) If the draft to be prepared be that of an assignment from a vendor to a purchaser of the patent, the two previous recitals must be omitted, and their place be filled by the recital of the common contract for sale—

Variation for assignment to a purchaser.

"And whereas the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the said letters patent, and the full benefit thereof, and of any other letters patent which shall be granted for the said invention at or for the price or sum of £——."

Of course the witnessing part will in that case contain the ordinary statement of the consideration and receipt, and will be "in pursuance of the said agreement," instead of "for effectuating the said desire."

(*e*) The precedent in the text is taken from a draft which was prepared before the statute, 5 & 6 Will. 4, c. 83; (see ante, p. 188, n. (*i*)). It may now, perhaps, be proper to introduce the following words:—

Extension of terms of patent.

"including full power and authority to apply for and obtain any new or other letters patent for the said invention, or any extension or prolongation of the said term in the hereinbefore recited letters patent."

But it cannot be said that they are essential, as the statute gives the power of obtaining an extension of the term to "any person who now hath or hereafter shall obtain any letters patent *as aforesaid*);" meaning, (see the first section), "as grantee, assignee, or otherwise."

If the above alteration should be made in the draft, the habendum should contain, after the words "fourteen years," the addition, "and for such further or extended term (if any) as aforesaid."

LETTERS PATENT.

AND ALL the estate, right, title, interest, term of years, benefit, property, claim, and demand whatsoever, at law and in equity, of him, the said A. B., of, in, to, out of, or upon the said premises hereby assigned, or expressed and intended so to be, and every part thereof, TO HAVE, HOLD, and enjoy the said letters patent, powers, privileges, and authorities, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, for all the residue now to come of the said term of fourteen years, in as full, ample, and beneficial a manner, to all intents and purposes, as he, the said A. B., might or could have held or enjoyed the same if these presents had not been made and executed: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, that he, the said A. B., hath not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to, any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said letters patent are, can, shall, or may be surrendered, forfeited, or made void or voidable, or whereby, or by reason or means whereof, he, the said A. B., is in anywise hindered or prevented from assigning the said letters patent and premises hereinbefore assigned, or expressed and intended so to be, in manner aforesaid, according to the true intent and meaning of these presents (*f*). IN WITNESS &c.

Habendum to assignee.

Covenant by assignor.

that he has not invalidated the patent.

—and for right o assign.

Covenants in assignment on purchase.

(*f*) If the draft be that of an assignment from vendor to purchaser, it must contain the usual covenants for title, which may readily be framed from those given in Precedents XXXVII. or XLI. The covenant for further assurance should, perhaps, contain some words to cover the new term which may be granted in the patent.

Variation.

The following covenants have been taken from an assignment of a special nature, in which the vendor retained an interest in the produce of the patent, although an assignment was made instead of a mere license:—

Covenants

"AND THE SAID A. B. doth hereby, for himself, his

LETTERS PATENT.

heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, that the said letters patent hereinbefore assigned, or expressed and intended so to be, are good, valid, and effectual, for all and every the several inventions therein mentioned, and are in nowise invalidated, or become void or voidable: AND THAT he, the said A. B., now hath in himself good right, full power, and lawful and absolute authority, to assign the said letters patent, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND THAT the right to make, use, exercise, and vend the said inventions described in the said specification, and every or any of the said inventions, and every or any part thereof, and either alone or with any additions, alterations, or improvements whatsoever, shall and may be solely, and exclusively, and peaceably, and quietly exercised, used, and enjoyed by the said C. D., his executors, administrators, and assigns, without any act, suit, denial, interruption, or disturbance, by any person or persons whomsoever: AND FURTHER, THAT if any person or persons whomsoever, other than the said C. D., his executors, administrators, or assigns, shall make, use, or put in practice the said inventions, or any of them, or any part of the same, or in anywise counterfeit or imitate the same, or shall make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors thereof, or shall infringe upon the said patent in anywise howsoever, then and in such case, and so often as the same shall happen, he, the said A. B., his executors and administrators, and every of them, shall and will commence, carry on, and prosecute, all and every such actions, suits, and proceedings, at law and in equity, or otherwise, for the purpose of protecting the said patent, and obtaining damages and reimbursements for the infringement thereof, as the said C. D., his executors, administrators, or assigns, shall deem requisite or necessary, and shall and will, in

—for the validity of the patent.

—for right to assign.

—for quiet enjoyment.

—for indemnity against infringements.

LETTERS PATENT.

conducting all such actions, suits, and proceedings, employ such solicitor or attorney, solicitors or attorneys, as the said C. D., his executors, administrators, or assigns, shall appoint: AND FURTHER, THAT he, the said A. B., his executors, administrators, and assigns, and all and every other person or persons having or claiming, or to have or claim, any estate, right, title, or interest whatsoever, either at law or in equity, of, in, to, out of, or upon the said letters patent, or the inventions described in the said specification, or any of them, or any part thereof, shall and will from time to time, and at all times hereafter, make, do, and execute all such further and other acts, deeds, matters, and things, for the better and more effectually assigning to the said C. D., his executors, administrators, and assigns, the said letters patent hereinbefore assigned, or intended so to be, and for securing to the said C. D., his executors, administrators, and assigns, the sole and exclusive use of the said inventions, and every of them, and every part thereof, as the said C. D., his executors, administrators, or assigns, or his or their counsel, shall deem requisite or necessary: AND IT IS HEREBY agreed and declared, that the costs and charges to be incurred in all and singular actions, suits, and proceedings, commenced, carried on, and prosecuted under the covenant in that behalf hereinbefore contained, and the costs and charges of all such acts, deeds, matters, or things, as shall be made, done, or executed, under the covenant lastly hereinbefore contained, shall be borne and paid in equal moieties or half-parts by the said A. B., his executors or administrators, and the said C. D., his executors, administrators, or assigns; and all damages and sums of money which shall be recovered or received by means of such actions, suits, and proceedings, or any of them, shall be shared and divided in equal moieties, or half-parts, between the said A. B., his executors or administrators, and the said C. D., his executors, administrators, or assigns: AND IT IS HEREBY agreed and declared, that in case the said A. B., his executors or administrators, shall obtain any renewal or extension of the said letters patent for any term or terms whatsoever, then, and in such case,

—and for further assurance.

Provision as to costs and damages.

Provision as to a renewed patent.

XLI.

ASSIGNMENT *of* POLICIES *of* ASSURANCE (*a*); *part of the* CONSIDERATION *being a* COVENANT *by the* PURCHASER *to pay a* MORTGAGE DEBT. POLICIES OF ASSURANCE.

THIS INDENTURE made &c. BETWEEN A. B., of, &c. [*vendor*], of the one part; and C. D., of &c. [*purchaser*], Parties.

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he or they shall and will assign and assure unto the said C. D., his executors, administrators, or assigns, the full and exclusive use and benefit of the said renewed letters patent, and the said extended term, subject nevertheless to all the same covenants, provisions, and stipulations, (mutatis mutandis), with respect to the said renewed letters patent, and the said extended term, as are contained in these presents with respect to the said letters patent hereinbefore in part recited."

(*a*) In respect to policies of assurance on lives, see ante, pp. 90, 91, and the cases there cited. It is extremely important, though very difficult, for the purchaser or mortgagee of a policy of assurance to ascertain, that no misrepresentation was made to the assurer by the parties who effected the assurance, or the person on whose life the policy was granted; for policies are always so framed as to be rendered void by any such misrepresentation having been made. (*Maynard* v. *Rhodes*, 1 C. & P. 360; S. C. 5 Dow. & Ry. 266; *Everett* v. *Desborough*, 5 Bing. 503; S. C. 5 Moo. & Pay. 190; *Wainwright* v. *Bland*, 1 Mee. & Wels. 32; *Duckett* v. *Williams*, 2 Cro. & Mee. 348; S. C. 4 Tyr. 240). So, a suppression of any material fact will vitiate the policy, although the party by whom the suppression was made did not consider the fact material. (*Von Lindenau* v. *Desborough*, 8 B. & C. 586; S. C. 3 Man. & Ry. 45; *Morrison* v. *Muspratt*, 4 Bing. 60; S. C. 12 J. B. Moore, 231; *Huckman* v. *Fernie*, 3 Mee. & Wels. 505; *Huguenin* v. *Rayley*, 6 Taunt. 186. See, however, *Swete* v. *Fairlie*, 6 Car. & Pay. 1). But a disorder which a person has before he assures his life, is not necessarily a "disorder tending to shorten life," because he afterwards dies of it. (*Watson* v. *Mainwaring*, 4 Taunt. Policies of assurance on lives. —vitiated by misrepresentation. —or suppression.

POLICIES OF ASSURANCE.

Recital of a policy, effected

of the other part: WHEREAS M. N., by a policy of assurance, bearing date the —— day of ——, numbered

763). As to the medical man to whom reference should be made as to the health of the assured, see *Morrison* v. *Muspratt*, *Everett* v. *Desborough*, *Huckman* v. *Fernie*, ubi supra.

A bill in equity will lie at the suit of an assurance office, to have a policy delivered up to be cancelled, on the ground of fraud in effecting the assurance; and the plaintiffs will have a better equity if they bring their bill in the lifetime of the assured than if they wait till after his death. (*Fenn* v. *Craig*, 3 You. & Col. 216). In this case, too, and in the cases referred to in the note to it, p. 224, will be found considerable information as to the proper parties to such suits.

If a policy be not on the person's own life, it should be seen that the person by whom it was made had an insurable interest. (See ante, pp. 90, 91). It seems, that, although a father has not an insurable interest in the life of a child, yet that a wife has such an interest in the life of her husband. (*Reed* v. *Royal Exchange Assurance Company*, Peake's Add. Cases, 70). A creditor has an insurable interest in the life of his debtor; (Ante, p. 91; *Von Lindenau* v. *Desborough*, 8 B. & C. 586); unless the debt have been incurred at play, (*Dwyer* v. *Edie*, 2 Park on Insurance, 639): and an executor may insure in his own name the life of a debtor to a testator. (*Tidswell* v. *Ankerstein*, Peake's Cases, 151; see, too, *Ex parte Houghton*, 17 Ves. 253).

If the debt be paid off, the debtor on payment of the premiums is entitled to the policy. (*Holland* v. *Smith*, 6 Esp. 11; *Ex parte Andrews*, 2 Rose, 410; 1 Lloyd & Goold, 289). For although it was decided by *Godsall* v. *Boldero*, (ante, p. 91), that the money could not be recovered from the office if the debt were paid aliunde, yet the practice of the offices is to pay without inquiry. (1 Lloyd & Goold, 291; *Barber* v. *Morris*, supra, p. 91).

—in Ireland.

There is no act in Ireland requiring the person effecting an insurance on another's life to have an insurable interest in that life; and it seems that a clause in the policy, that, if the interest cease, the policy shall be void, is effective only between the office and the parties entitled to the money, and not between the parties themselves. (Lloyd & Goold, 290).

Other matters relating to assurance on lives.

A policy of assurance will pass in a will under the words, "debenture," or "debts;" (*Phillips* v. *Eastwood*, 1 Lloyd & Goold, 270, 291): and if the covenantee in a policy under seal, and also the policy, be at the time of his death inthe same diocese, the assurance moneys are bona notabilia in that diocese, although the funds of the assurance company may be in another diocese. (*Gurney* v. *Rawlins*, 2 Mee. & Wels. 87). If the payment of the money be delayed on account of the loss of the policy, the office is not compellable to pay interest. (*Bushnan* v. *Morgan*, 5 Sim. 635). Of course, on the bankruptcy of a person having a policy

——, and effected in the name of him the said M. N., assured the life of the said A. B., in the —— assurance office, in the sum of £——, at or under the annual premium of £—— (*b*): AND WHEREAS, by an indenture bearing date the ——, day of ——, and made or expressed to be made between the said M. N., of the one part, and the said A. B., of the other part, for the considerations therein mentioned, the said M. N. did assign the said policy and the moneys to become payable thereunder, unto the said A. B., her executors, administrators, and assigns: AND WHEREAS the said A. B., in the month of —— last, deposited the said policy of insurance with E. F., of &c., in

POLICIES OF ASSURANCE.

on life of A. B., by a stranger.

—of its having been assigned to A. B.

—and deposited as a security.

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of assurance, the benefit of it passes to his assignees. (*Ex parte Blagden*, 19 Ves. 466; S. C. 2 Rose, 249).

(*b*) The form of recital of a policy, which is given in the text, is the one in most general use, because the conveyancer is very seldom supplied with an abstract or copy of the policy. But the more regular and formal recital of a policy is in the following shape:—

Variation of recital of policy.

"WHEREAS, by a policy of assurance bearing date the —— day of ——, and numbered ——, under the hands [and seals*], of —— of the Directors of the —— Assurance [*or* "Insurance"] Office, [*or* "Company" *or* "Society," *as the case may be*], the sum of £—— is assured to be paid out of the stock and fund of the said Office, [*or* "Company," *or* "Society,"] to the said A. B., his executors, administrators, and assigns, within —— after the expiration of the first year of the term of the said assurance, in case the said C. D. shall die within such year, or if the said C. D. shall die after the expiration of such first year, then within —— next, after proof of the death of the said C. D. shall be made according to the rules and practice of the said Office, [*or* "Company" *or* "Society,"] at and under the annual premium of £——."

Some of the variations which circumstances occasion, are noticed in the brackets in the above form, but doubtless other changes will be required, as policies vary a good deal both in language and form.

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* Policies are sometimes only under the hands of the directors.

POLICIES OF ASSURANCE.

order to secure the repayment to him the said E. F. of a sum of £400, and interest thereon, after the rate of £5 per cent. per annum: AND WHEREAS the said A. B., by a policy of insurance, bearing date the —— day of ——, numbered ——, and effected in her own name with the —— Assurance Society, assured her life in the sum of £——, at or under the annual premium of £——: AND WHEREAS the said society advanced and lent to the said A. B. on the 22nd day of January, 1838, the sum of £262, and on the 31st day of July, 1838, the further sum of £320, and the said A. B. deposited the said last-mentioned policy of assurance with the said society, in order to secure the repayment to the said society of the said sums of £262 and £320, with interest for the same, respectively, after the rate of £5 per cent. per annum: AND WHEREAS the said A. B. has contracted with the said C. D. for the sale to him of the said two several policies of assurance, and all benefit thereof, at or for the price or sum of £990: AND WHEREAS, upon the treaty for the said sale, it was agreed that the said A. B. should pay the interest on the said sums of £400, £262, and £320, up to the day of the completion of the purchase, and that the said C. D. should, out of the said purchase-money or sum of £990, retain the sum of £982, to be applied in payment of the said sums of £400, £262, and £320, and should enter into the covenant hereinafter on his part contained, for payment of the said sums of £400, £262, and £320, and the interest henceforth to accrue due for the same, and for indemnifying the said A. B. in respect of the same sums, and the interest thereof respectively, in manner hereinafter mentioned: AND WHEREAS all interest on the said sums of £400, £262, and £320, has been paid by the said A. B., up to the day of the date of these presents: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the said sum of £400, so due and owing to the said E. F., and of the said sums of £262 and £320, so due and owing to the said —— Assurance Society, as hereinbefore is mentioned, and of the sum of £8, at or immediately before the

—of another policy effected on life of A. B.

—of the last policy having been deposited with the society as a security for advances.

—of contract for sale.

—of agreement for purchaser to retain mortgage money, and indemnify vendor.

—of interest on mortgage money having been paid up.

Witnesseth,

Consideration.

POLICIES OF ASSURANCE.

sealing and delivery of these presents, to the said A. B. paid by the said C. D., (the receipt of which said sum of £8, making together with the said sums of £262, £320, and £400, the said purchase-money or sum of £990, she the said A. B. doth hereby acknowledge, and of and from the same sums and every of them, and every part thereof respectively, doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns, for ever, by these presents), and of the covenant hereinafter contained on the part of the said C. D., to pay the same sums, she the said A. B. hath assigned, and by these presents doth assign, unto the said C. D., his executors, administrators, and assigns, ALL THAT, the said policy of assurance, effected in the said —— Assurance Office, and hereinbefore particularly mentioned, and all and every the bonuses and additions, sum and sums of money to become payable or to be received under or by virtue of the same, and the full benefit of the same (*c*); AND ALSO ALL THAT the said policy of assurance, effected with the said —— Assurance Society, and hereinbefore particularly mentioned,

Receipt.

Assignment.

—of the policies.

(*c*) In the case of *Courtney* v. *Ferrers*, (1 Sim. 137), the facts were as follows: E. U. having effected an assurance on his life for £3,000, by indenture, dated the 23rd of April, 1787, assigned to M. G. and G. R. the said policy of assurance, and all sums of money, benefits, and advantages, to arise, accrue, or become due or payable upon or by virtue of it in any manner whatsoever;" upon certain trusts declared by a deed of even date, and under which, before the year 1810, C. M. U., the daughter of E. U., had become absolutely entitled. Before that year, additions had been made by the assurance office to the £3,000, and by a settlement on the marriage of C. M. U., dated the 23rd of January, 1810; C. M. U. assigned to trustees, "all that the sum of £3,000, assured by the before-mentioned instrument, or policy of assurance, to be paid to the said M. G. and G. R., upon the decease of the said E. U." upon certain trusts under which C. M. U. became entitled to appoint the fund by will. C. M. U. by her will, dated the 23rd of July, 1810, gave and bequeathed to the said E. U. the sum of £1,000, part of the said sum of £3,000, and the remaining sum of £2,000 she gave and bequeathed equally between T. U. and J. U. C. M. U. died in 1811, and E. U. in 1825, and at his death £9,270 became payable under the policy. It was held that the whole sum was divisible amongst E. U., T. U., and J. U., in shares proportioned to the interests given them in the £3,000.

Courtney v. *Ferrers.*

POLICIES OF ASSURANCE.

and all and every the bonuses and additions, sum and sums of money to become payable, or to be received under or by virtue of the same, and the full benefit thereof: AND ALL the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of her the said A. B., of, in, to, out of, or upon the same premises, and every of them, and every part thereof: TOGETHER WITH full power and authority to ask, demand, sue for, recover, and receive, and give effectual receipts and discharges for the said sum or sums of money, and every part thereof, in the name or names of her the said A. B., her executors or administrators (*d*): TO HAVE, HOLD, RECEIVE, AND TAKE the said policies of assurance, sums of money, and all and singular other the premises hereinbefore assigned or expressed, and intended so to be, unto the said C. D., his executors, administrators, and assigns, for his and their own use and benefit, but subject to the payment of the said sums of £262, £320, and £400, and interest secured upon the same premises respectively, as hereinbefore is mentioned: AND THE SAID A. B. doth hereby, for herself, her heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, in manner following, (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever, by her the said A. B. made, done, committed, or executed, or knowingly or willingly permitted or suffered to the contrary, the said policies of assurance, at the time of the sealing and delivery of these presents, are good, valid, and effectual policies of insurance for the sums of £—— and £—— respectively, and are in full force unforfeited, unsurrendered, and in nowise vitiated, or become void or voidable; And that for and notwithstanding any such act, deed, matter, or thing as aforesaid, she the said A. B. now hath in herself good right, full power, and lawful and absolute authority to assign the said policies, sums of money and premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators,

And all the estate, &c.

Power of attorney.

Habendum to purchasers.

Covenants by vendor.

—that the policies are good.

—for right to assign.

(*d*) See supra, p. 253, n. (*b*).

and assigns, in manner aforesaid, according to the true intent and meaning of these presents; And also that she the said A. B. shall not nor will, at any time hereafter, do, commit, or suffer any act, matter, or thing, whereby or by reason or means whereof, the said policies of assurance, or either of them, shall or may be vitiated, or become void or voidable, or whereby or by reason or means whereof the said C. D., his executors, administrators, or assigns, shall or may be prevented or hindered from recovering or receiving the money intended to be thereby respectively assured, or any part thereof; AND ALSO, that she the said A. B., her executors and administrators, and all and every other person or persons whomsoever, having or claiming, or who shall or may have or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, out of, or upon the said policies and sums of money and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof, by, through, under, or in trust for her the said A. B., her executors or administrators, shall and will from time to time, and at all times hereafter, upon the request and at the costs of the said C. D., his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring the said policies, sums of money and premises hereinbefore assigned, or expressed and intended so to be, and every part thereof, unto the said C. D., his executors, administrators, and assigns, (subject to the payment of the said sums of £262, £320, and £400, and interest secured on the same premises respectively, as aforesaid), and enabling the said C. D., his executors, administrators, and assigns, to recover, receive, and obtain payment of the moneys intended to be assured by the said policies of assurance respectively, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised, or devised and required: AND THE SAID C. D. doth hereby for himself, his heirs, execu-

POLICIES OF ASSURANCE.

—and not to vitiate the policies.

—and for further assurance.

Covenant by purchaser to pay mortgage debts.

POLICIES OF ASSURANCE.

tors and administrators, covenant with the said A. B., her executors and administrators, that he the said C. D., his executors or administrators, shall and will pay the said sums of £400, £262, and £320, and each of them, and all interest henceforth to grow due for the same respectively, and shall and will from time to time, and at all times hereafter, save, defend, keep harmless and indemnified, the said A. B., her heirs, executors, and administrators, and every of them, their and every of their estates and effects, of and from the said sums of £400, £262, and £320, and every of them, and every part thereof, and all interest for the same, and of and from all actions, suits, accounts, reckonings, claims, and demands whatsoever, either at law or in equity, for or in respect of the same principal sums and interest, or any part thereof respectively (*e*). IN WITNESS &c. (*f*).

(*e*) See infra, p. 389, n. (*l*).

Notice of assignment to be given to the assurance society.

(*f*) Every person intending to purchase or take a mortgage of a policy of assurance, should inquire of the secretary, or public officer, of the society, whether notice has been given to the society of any previous assignment or charge upon the policy, and should immediately after the execution of his own assignment or security, give notice of it to the society. (See *Williams* v. *Thorp*, 2 Sim. 257).

Notice of assignment of choses in action.

Personal property passes by delivery of possession, and if one man having the right of possession leaves the actual possession in another, he cannot be allowed to recover from third parties who may have given a valuable consideration for the property to the ostensible owner of it. If he, who has the right, does not take possession, he does not follow up the title, and must take the consequences of his own laches *. A chose in action does not admit of actual possession, but the assignee of such an interest must do every thing towards obtaining possession which the subject admits of; he must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as his property. For this purpose, he must give notice to the legal holders of the fund; and if he omit to do so, he is guilty of the same degree and species of neglect, and must suffer the same loss, as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person. (See 3 Russ. 22, 23).

To whom notice should be given.

Thus, on the assignment of a simple contract debt, or a bond debt, notice must be given to the debtor. (*Ryall* v. *Rowles*, 1 Ves. sen. 371;

* See, however, *Reeves* v. *Capper*, 5 Bing. N. C. 136.

POLICIES OF ASSURANCE.

1 Atk. 382: *Ex parte Monro*, Buck, 300; *Ex parte Burton*, 1 Glyn & Jam. 237; *Ex parte Usborne*, Id. 358; *Ex parte M'Turk*, 2 Dea. 58). On the assignment of a sum of money, or of an interest in a sum of money, in the hands, or invested in the names of trustees or executors, notice must be given to the trustees. (*Dearle* v. *Hall*, *Loveridge* v. *Cooper*, 3 Russ. 1; *Foster* v. *Blackstone*, 1 My. & Ke. 297; S.C. nom. *Foster* v. *Cockerell*, 3 Clark & Finn. 456; *Smith* v. *Smith*, 2 Cro. & Mee. 231; *Timson* v. *Ramsbottom*, 2 Keen, 35). If the interest assigned be a fund in court, an order must be obtained that it shall not be transferred without notice to the assignee, and the order must be left at the Accountant-General's Office, and entered. (*Greening* v. *Beckford*, 5 Sim. 195). But this, coupled with an order to restrain the payment of the dividend, is the only relief that can be had upon petition, unless by consent; any ulterior relief can only be had upon a bill filed for the purpose. (*Cook* v. *Collingridge*, 1 C. P. Cooper, 255). On the assignment of the freight and earnings of a ship, the assignee must give notice to the person from whom they are to be received. (*Gardner* v. *Lachlan*, 6 Sim. 407; 8 Sim. 123). If a person have shares standing in his name in the books of a public company, and deposit the certificates of the shares as a security, notice of the deposit must be given to the company. (*Ex parte Spencer*, 1 Dea. 468; *Ex parte Masterman*, 4 Dea. & Chit. 751; *Cumming* v. *Prescott*, 2 You. & Coll. 486; see, however, *Ex parte Vauxhall Bridge Company*, 1 Glyn & Jam. 101; *Ex parte Watkins*, 2 Mon. & Ayr. 348; *Ex parte Brown*, 3 Dea. 91; *Ex parte Richardson*, 3 Deacon, 496). On the assignment or deposit of a policy of assurance notice must be given to the society. (*Williams* v. *Thorp*, 2 Sim. 257; *Ex parte Colvill*, Mont. 110; *Ex parte Stright*, 2 Dea. & Chit. 314; S.C. Mont. 502; *Ex parte Carlis*, 4 Dea. & Chit. 354; *Ex parte Waithman*, Id. 412; *Ex parte Tennyson*, 1 Mont. & Bligh, 67).

Notice gives priority.

The result deduced from the preceding cases is, that an assignee of a chose in action, who has not given to the proper persons sufficient notice of his assignment, will be postponed to a subsequent assignee, who has given such notice, and to the assignees under a fiat in bankruptcy against the assignor. The priority of claim is entirely regulated by the date of the notice. It is settled, too, that, if a depositary of a bond or other specialty, or of the certificates of shares, or of a policy of assurance, has not given the notice required, he cannot make a claim good as against the assignees under a fiat in bankruptcy; (see the cases, supra); but it would seem that such a depositary, if prior in point of time, would have a superior claim to a particular assignee who gave notice, but omitted to demand possession of the documents. For it is laid down that delivery is as essential as notice; and, neither party having a complete title, the first in point of time would be preferred. (See 3 Russ. 27; 1 Atk. 177). Of course every assignee should insist upon having the possession of the documents, as his title cannot be deemed safe or perfect without them. It should be understood, too, that this doctrine of notice applies only to

POLICIES OF ASSURANCE.

equitable interests in the nature of choses in action, and not to dealings with an equity of redemption of real estate. (3 Russ. 35; *Jones* v. *Jones*, 8 Sim. 633).

What is sufficient notice.

The question, what is a sufficient notice to the legal owner of the fund, has given rise to much discussion. When the fund is in the hands of trustees, a notice given to *one* of those trustees, and that as a mere matter of conversation, is sufficient. (*Smith* v. *Smith*, 2 Cro. & Mee. 231). But the knowledge which one of several executors or trustees has of an assignment made to himself by a legatee is not sufficient as against a subsequent particular assignee, (*Timson* v. *Ramsbottom*, 2 Keen, 35), although it will suffice as against the assignees in bankruptcy. (*Ex parte Smart*, 2 Mon. & Ayr. 60). A letter to the secretary of an insurance-office, in which the writer says, "I am the holder of the undermentioned policies," and inquires what the office would give for them, is sufficient notice of assignment. (*Ex parte Stright*, 2 Dea. & Chit. 314; S. C. Mont. 502; see, too, *Ex parte Bignold*, 3 Dea. 151). A conversation between a clerk in the office and the person paying the premium is not sufficient. (*Ex parte Carlis*, 4 Dea. & Chit. 354). But a deposit by a director of the office with bankers, one of whom was an auditor of the office, is sufficient. (*Ex parte Waithman*, 4 Dea. & Chit. 412). If the agreement be with the company itself, it seems that formal notice is not required. (*Ex parte Harrison*, 3 Dea. 185; see, however, *Ex parte Bignold*, 3 Dea. 151; see, further, *Cumming* v. *Prescott*, and the other cases previously cited; and *Ex parte Walker*, 1 Mont. & Ayr. 639). It seems that, in respect at least to a policy of assurance, the burden does not lie on the assignee to shew that notice was given, but on the opposing claimants to shew that it was not. (*Ex parte Stevens*, 4 Dea. & Chit. 117). In the case of *Foster* v. *Hargreaves*, (1 Keen, 281), in which the circumstances were very peculiar, it was held that the doctrine of notice did not apply.

Notice binding on the holders of the fund.

The parties to whom notice of assignments ought to be given are bound to take and act upon the notice when it is given. (*Williams* v. *Thorp*, ubi supra; *Baldwin* v. *Billingsley*, 2 Vern. 539; and the other cases previously cited). Of course it is not necessary for an assignee of a mortgage debt secured upon land to give notice to the mortgagor, but it is prudent to do so; for payments made by the mortgagor to the mortgagee after the assignment are good as against the assignee, if the mortgagor had no notice of the assignment. (*Jones* v. *Gibbons*, 9 Ves. 407; *Williams* v. *Sorrel*, 4 Ves. 389).

Necessity of inquiry as to prior incumbrances.

It is obvious, from the cases cited in the preceding part of this note, that no person should take an assignment of a chose in action without first inquiring of the legal holder of the fund, whether he has previously received notice of any assignment of or charge or lien upon the fund. The person of whom the inquiry should be made is, of course, the person to whom the notice should be given; but it must be remembered, that, as notice to one of several trustees or executors is sufficient, inquiry as to incumbrances must be made of each of them. (*Smith* v. *Smith*, 2 Cro. & Mee. 231). If the fund be in court, inquiry must be made at the Accountant-

XLII.

ASSIGNMENT *of* GOODWILL *and* STOCK *in* TRADE *to* TWO CO-PARTNERS.

GOODWILL AND STOCK IN TRADE.

THIS INDENTURE &c. BETWEEN A. B., of &c., [*vendor*], of the one part, and C. D. and E. F., of &c., —— (*a*), and co-partners [*purchasers*], of the other part: WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made or expressed to be made between [*parties*], the dwelling-house, garden, factory, and other hereditaments in the said indentures particularly mentioned, situate in the parish of ——, in the county of ——, were conveyed, assured, and limited to such uses as the said A. B. should in manner therein mentioned appoint (*b*), and, in default of such appointment, to the use of the said A. B. and his assigns for his life, with remainder to the use of G. H. and his heirs during the life of the said A. B., in trust for him and his assigns, with remainder to the use of the said A. B., his heirs and assigns for ever: AND WHEREAS, under and by virtue of an indenture of demise, bearing date the 5th day of October, 1820, and made or expressed

Parties.

Recital of conveyance of freeholds to uses to bar dower for vendor.

—of lease to vendor.

General's and Registrar's Offices, whether any order has been made affecting the fund. (*Greening* v. *Beckford*, 5 Sim. 195).

If the holder of a fund make a false representation to an intended assignee of it, he is personally liable to make good any loss which the assignee may sustain; but it would seem that, to render the holder personally liable, he must have made the representation in writing. (*Lyde* v. *Barnard*, 1 Mee. & Wels. 101; *Swan* v. *Phillips*, 3 Nev. & Per. 447).

Liability of a holder of the fund who makes a false representation.

(*a*) The blank should be supplied by the description of the business, as "merchants," "ironmasters," "cotton-spinners," &c.

(*b*) This recital, and those which follow of the leases, are more brief and less accurate and formal than is usual, on account of the length of the deed, and because it was sufficient to shew in whom the property was vested without particular reference to the nature of the estate.

GOODWILL AND STOCK IN TRADE.

to be made between [*parties*], the said A. B. is entitled to the messuages, tenements, and hereditaments, in —— street, in the parish of ——, in the county of ——, in the said indenture of the 5th day of October, 1820, particularly mentioned, for all the residue of a term of twenty-one years, to be computed from the 20th day of September, 1820, at, under, and subject to the rent, covenants, conditions, and agreements, by and in the said indenture of the 5th day of October, 1820, reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be paid, observed, and performed: [*Similar recital of another lease, dated the 31st of March, 1825*]: AND WHEREAS, by an agreement, bearing date the 4th day of July, 1822, and made or expressed to be made between [*parties*], the said [*lessors*] agreed to grant, and the said A. B. to accept, a lease for twenty-one years from Midsummer day then last, of the lands and hereditaments in the parish of ——, in the said county of ——, in the said agreement particularly mentioned, at, under, and subject to such rents, covenants, conditions, and agreements, on the part of the said A. B., his executors, administrators, or assigns, to be paid, kept, observed, and performed, as are in the said agreement particularly mentioned: AND WHEREAS the said A. B. hath heretofore carried on the business of a —— at —— aforesaid and at several other places: AND WHEREAS the said A. B. is possessed of or entitled to an extensive stock in trade, consisting of materials for manufacture and manufactured goods, machinery, and implements of manufacture and trade, fixtures, furniture, and other articles at —— aforesaid and in other places, and is also entitled to book debts due to him to a large amount, and to a sum due to him on the balance of his account at his bankers: AND WHEREAS the particulars of the said book debts due to the said A. B., and also of the said debts owing by the said A. B., are all entered in and appear by the books of account of the said A. B.: AND WHEREAS the said A. B. is entitled to divers other sums due to him on divers securities, including a debt of large amount due from X. Y., Esq., and secured by bond and mortgage: AND WHEREAS

—of another lease to vendor.

—of an agreement for lease to vendor.

—of vendor having carried on trade.

—and being entitled to stock in trade and book debts.

—and money in bank.

—and being indebted.

—of particulars being entered in account books.

—of vendor having money due to him on securities.

—and being en-

GOODWILL AND STOCK IN TRADE.

the said A. B. is also entitled to certain contracts or orders connected with the said trade or business: AND WHEREAS the said A. B. is desirous of retiring from the said business or trade of ——: AND an arrangement hath been entered into between the said A. B. on the one part, and the said C. D. and E. F. on the other part, for the retirement of the said A. B. from the said business or trade of ——, and for the succeeding of the said C. D. and E. F. to the said trade or business in all its branches: AND AS PART of the said arrangement, it was agreed that the said A. B. should, in consideration of £—— (*c*), convey the said freehold hereditaments comprised in the said indentures of the —— and —— days of —— unto and to the use of the said C. D. and E. F., their heirs and assigns, and should, in consideration of £——, assign the said leasehold premises comprised in the said indenture of the 5th day of October, 1802, to the said C. D. and E. F., their executors, administrators, and assigns, and should, in consideration of £——, assign the said leasehold premises comprised in the said indenture of the 31st day of March, 1825, to the said C. D. and E. F., their executors, administrators, and assigns, and should, in consideration of £——, assign the said premises comprised in the said agreement of the 4th day of July, 1822, to the said C. D. and E. F., their executors, administrators, and assigns: AND should also assign to the said C. D. and E. F., their executors, administrators, and assigns, all the stock in trade, consisting of the particulars hereinbefore mentioned, to which the said A. B. is entitled as aforesaid, and all the said contracts and orders connected with the said trade or business, and the full benefit thereof, and all the book and other debts due to the said A. B. as aforesaid, and all the securities for the same, (except the said debt due from the said X. Y. and the securities for the same), and should also transfer the said balance due to him the said A. B., on his account, at his

titled to contracts.

—and desiring to retire from business, and arrangement for purchasers to succeed.

Particulars of arrangement.

(*c*) With respect to the principle on which the purchase-money should be apportioned, see ante, p. 104, n. (*b*); and Vol. I. Book IV. OF STAMPS ON ASSURANCES.

GOODWILL AND STOCK IN TRADE.

banker's: AND AS FURTHER PART of the said arrangement, it was agreed that the said C. D. and E. F. should, by their joint and several bond, secure to be paid to the said A. B. an annuity of £800 during his life: AND that the said C. D. and E. F. should, by their joint and several bond, secure to the said A. B., his executors or administrators, the payment, at or before the expiration of seven years from the death of the said A. B., of the sum of £5,000, with interest for the same in the meantime after the rate of £5 per cent. per annum: AND that the said C. D. and E. F. should immediately before the execution of these presents pay the further sum of £20,000, (including the said sums of £——, £——, £——, and £—— agreed to be paid as the consideration for the said freehold and leasehold premises, as aforesaid), into the hands of W. C., of ——; P. W., of ——; and F. E., of ——, to be by them held upon the trusts hereinafter referred to: AND AS FURTHER PART of the said arrangement, it was agreed that the said C. D. and E. F. should indemnify the said A. B. in manner hereinafter mentioned, against all the debts and liabilities which, by the said books of account of the said A. B., appear to be due from the said A. B., or to which by the said books he appears to be liable, (including the said contracts and orders), all which said books of accounts before the execution of these presents have been delivered to the said C. D. and E. F., and are respectively as follows, (that is to say) ——: AND AS FURTHER PART of the said arrangement, it was agreed that these presents should contain the several other covenants, clauses, and stipulations, hereinafter contained: AND WHEREAS, for effectuating the said arrangement, by an indenture of appointment and release bearing even date with and executed before the execution of these presents, grounded so far as the same operated as a release in a lease for a year, and made or expressed to be made between [*parties*], the said A. B. hath appointed, and granted, and released (*d*) the dwelling-house, garden,

Recital of arrangement having been partly effectuated.

—by conveyance of freeholds.

(*d*) This recital is informal and inaccurate. (See ante, p. 212, n. (*g*), and supra, n. (*b*).

GOODWILL AND STOCK IN TRADE.

factory, and hereditaments in the said indentures of the —— and —— days of —— particularly mentioned, to the use of the said C. D. and E. F., their heirs and assigns: AND WHEREAS, for further effectuating the said arrangement, by an indenture bearing even date with, but executed before the execution of these presents, and made or expressed to be made between [*parties*], and indorsed on the said indenture of the 5th day of October, 1820, the said A. B. hath assigned unto the said C. D. and E. F., their executors, administrators, and assigns: ALL those messuages or tenements and premises in —— aforesaid, in the said indenture of the 5th day of October, 1820, particularly mentioned: TO HOLD the same unto the said C. D. and E. F., their executors, administrators, and assigns, for all the residue of the said term of twenty-one years in the same premises, at, under, and subject to the rents, covenants, conditions, and agreements, by and in the said indenture of the 5th day of October, 1820, reserved and contained, and on the part of the lessee, his executors, administrators, or assigns, to be paid, kept, observed, and performed, [*similar recitals as to premises in second lease, and as to premises comprised in the agreement, adding,* "and all benefit of the said agreement"]: AND WHEREAS, for further effectuating the said arrangement, the said A. B. hath this day transferred the balance belonging to him at his banker's to the account of the said C. D. and E. F.: AND WHEREAS, for further effectuating the said arrangement, the said A. B. hath before the execution of these presents delivered and made over to the said C. D. and E. F. all and singular the bills, bonds, notes, and other securities whatsoever, for all those of the debts due to the said A. B. in respect of his said trade or business or otherwise, for which the said A. B. held any security other than the securities for the said debt from the said X. Y: AND WHEREAS, for further effectuating the said arrangement, the said C. D. and E. F. have, before the date and execution of these presents, given and executed to the said A. B. their joint and several bond, bearing even date with these presents, and in the penal sum of £——, with a condition thereunder written, for making void the same if the said

—by assignment of leaseholds.

—by transfer of balance.

—by delivery of securities.

—by bond for securing annuity.

GOODWILL AND STOCK IN TRADE.

C. D. and E. F., or either of them, their or either of their heirs, executors, or administrators, or any of them, shall pay or cause to be paid unto the said A. B. or his assigns during his life an annuity or clear yearly sum of £800, by two equal half-yearly payments, on the —— day of —— and the —— day of —— in every year, without any deduction or abatement whatsoever, and shall make the first half-yearly payment of the said annuity on the —— day of —— next ensuing, if the said A. B. shall be then living: AND WHEREAS, for further effectuating the said arrangement, the said C. D. and E. F. have before the date and execution of these presents given and executed to the said A. B., their joint and several bond, bearing even date with these presents, and in the penal sum of £——, with a condition thereunder written for making void the same if the said C. D. and E. F., or either of them, their or either of their heirs, executors, or administrators, or any of them, shall at the expiration of seven years after the death of the said A. B., or at such earlier time as to the said C. D. and E. F., or either of them, their or either of their heirs, executors, or administrators, shall seem fit, pay, or cause to be paid to the said A. B., his executors, administrators, or assigns, the sum of £5,000, without any deduction or abatement whatsoever, with interest for the same sum of £——, or for so much thereof as shall for the time being remain unpaid, at the rate of £5 per cent. per annum in the meantime, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year, the first half-yearly payment of interest to be made on the —— day of —— next ensuing: AND WHEREAS, for further effectuating the said arrangement, the said sums of £——, £——, £——, £——, so expressed to be paid to the said A. B. in the said several indentures of even date with these presents as aforesaid, together with the further sum of £——, making together the sum of £20,000, have with the privity and at the request of the said A. B. been paid by the said C. D. and E. F. to the said W. C., P. W., and F. E., at or before the execution of these presents, the trusts upon which the said sum of £20,000 are agreed to be held being

—by bond for securing principal sum.

—by payment of other principal sums.

intended to be declared by a separate deed, intended to bear even date with these presents: NOW THIS INDENTURE WITNESSETH, that, for further effectuating the said arrangement, and in consideration of the premises, and of the covenants and agreements hereinafter entered into by the said C. D. and E. F.: HE the said A. B. hath assigned and confirmed, and by these presents doth assign and confirm unto the said C. D. and E. F., their executors, administrators, and assigns, ALL that the interest or goodwill of him the said A. B., of, in, or concerning the said business or trade of ——, and of, in, or concerning all and singular other the businesses, trades, or manufactures heretofore carried on by the said A. B., in connexion with or as subsidiary to the said business or trade of ——, or in anywise relating thereto (*e*): AND also all and singular the book debts due or owing to him the said A. B., and all and singular the debts other than book debts due and owing to him the said A. B., and the securities for which have been delivered and made over to the said C. D. and E. F. as aforesaid: AND all and singular the securities for the said debts respectively, or any of them, and the full benefit thereof: AND all and singular contracts and engagements entered into with and orders given to the said A. B., and the full benefit and profit arising therefrom: AND all and singular the goods, wares, merchandise, stock in trade, machinery, and implements of manufacture and trade, fixtures, furniture, articles, effects, matters, and things belonging to him the said A. B. in respect of his said business or trade of ——, or in anywise used in or belonging to the said business or trade, or the places where the same is carried on, AND ALL THE ESTATE, &c.: TO HAVE, HOLD, receive, take, and enjoy all and singular the premises hereby assigned, or expressed and intended so to be, unto the said C. D. and E. F., their executors, administrators,

GOODWILL AND STOCK IN TRADE.

Witnesseth.

Assignment of goodwill.

—debts.

—securities.

—contracts.

—stock in trade.

Habendum.

(*e*) The words relating to the connected or subsidiary businesses are, of course, frequently inapplicable. The draft from which the precedent in the text was taken, related to a business of a very extensive nature, and consisting of several distinct branches.

GOODWILL AND STOCK IN TRADE.

and assigns, to and for their own proper use and benefit, as and for their own proper goods and chattels absolutely for ever: AND FOR BETTER and more effectually receiving and getting in the said several debts, effects, and premises, and enforcing the said contracts and engagements, and every or any of them, he the said A. B. hath made, ordained, constituted, and appointed, and by these presents doth irrevocably (*f*) make, ordain, constitute, and appoint the said C. D. and E. F., and the survivor of them, and the executors or administrators of such survivor, and any other person or persons whom the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, shall nominate as their or his substitutes or substitute, the true and lawful attornies and attorney of him the said A. B., in the name of him the said A. B. or otherwise, but for the proper use and benefit of the said C. D. and E. F., their executors, administrators, and assigns, to demand, call in, and receive the said debts, effects, and premises of and from all and every person and persons liable, or intrusted to pay or deliver the same respectively, and to use, take, and prosecute every or any lawful or equitable method, course, or expedient for recovering, receiving, and getting in the same debts and effects, or any part or parts thereof, and for enforcing the performance of the said contracts and engagements by every or any persons or person liable to perform the same (*g*), and to sign or subscribe the name of

Power of attorney.

Power to receive debts irrevocable.

(*f*) A power of attorney to receive debts, or other choses in action which have been assigned for a valuable consideration, is, like any other power of attorney, revoked by the death of the principal. (*Mitchell* v. *Eades*, Prec. in Chan. 125; *Lepard* v. *Vernon*, 2 Ves. & Bea. 51; *Watson* v. *King*, 4 Camp. 272; S. C. 1 Stark. 121). But it is not revocable by the act of the principal. (*Walsh* v. *Whitcombe*, 2 Esp. 565; *Gausser* v. *Morton*, 10 B. & C. 731; *Hodgson* v. *Anderson*, 3 B. & C. 842, 854; *Bromley* v. *Holland*, 7 Ves. 28). If, however, the consideration for which the power was given fail, the power becomes revocable. (*Ex parte Smither*, 1 Dea. 413.

Necessary authorities implied.

(*g*) Even in the absence of express authority, a power to do any act implies an authority to do whatever is necessary or expedient for performing that act. (*Randall* v. *Harvey*, 2 Roll. Rep. 390; *Howard* v.

GOODWILL AND STOCK IN TRADE.

the said A. B. to every or any bill or note, the indorsement or acceptance of which by the said A. B. shall be necessary or convenient (*h*), and to do or cause to be done every other act, matter, and thing necessary or convenient in or about the said premises, and that in as full, ample, and beneficial a manner, to all intents and purposes, as he the said A. B. might have done in case these presents had not been made and executed, or as if the said A. B. were present and did the same: AND FOR THE considerations aforesaid, he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors, administrators, and assigns, in manner following, (that is to say), that he the said A. B. hath not at any time heretofore contracted any debt or debts, or become bound, bail, or security, or otherwise engaged or obliged to pay any debt or debts, or sum or sums of money, which can or may charge or affect the stock in trade, goods, debts, effects, or premises hereinbefore assigned, or intended so to be, or any of them, or any part or parts thereof, or for the recovery whereof the said C. D. and E. F., or either of them, their or either of their executors or administrators, may be subject or liable to be sued or prosecuted in any court of law or equity whatsoever,

Covenants by vendor.

—against incumbrances.

Baillie, 2 H. Black. 618; *Ex parte Crowther*, 4 Dea. & Chit. 31; *Re Sampson*, 3 Dea. & Chit. 198). But the form in common use expressly grants all necessary authorities as in the text.

(*h*) A power to receive debts does not authorize the attorney to indorse or negotiate bills in the name of the principal; (*Kilgour* v. *Finlyson*, 1 H. Bl. 155; *Murray* v. *East India Company*, 5 B. & Ald. 204, 211; *Hogg* v. *Snaith*, 1 Taunt. 347; *Smith* v. *Winter*, 4 Mee. & Wels. 461); and it seems that such an extension of the power will not be implied by evidence of the usage of attornies acting under like power. (*Hogg* v. *Snaith*, ubi supra; see, however, *Tomkin* v. *Fuller*, 3 Doug. 300). And no general words will give such an extension to the power, for general words must be construed in reference to the subject-matter of the power, and as only giving such powers as were incidental to the business in hand. (*Hay* v. *Goldsmid*, 2 Smith, 79; *Attwood* v. *Manning*, 7 B. & C. 278; 1 Man. & Ry. 66: *Witherington* v. *Herring*, 5 Bing. 442; S. C. 3 Moo. & Pay. 30: *Esdaile* v. *La Nauze*, 1 You. & Col. 394).

Power to receive debts does not authorize the indorsement of bills.

GOODWILL AND STOCK IN TRADE.

(except such debts as are entered, and now appear to be due or owing in the said books kept by the said A. B. for that purpose, and which have been delivered by the said A. B. to the said C. D. and E. F., as aforesaid), and that all the debts which by the said books of account appear to be due to the said A. B., and also all other the debts, the securities for which have been delivered over by the said A. B. to the said C. D. and E. F., as aforesaid, are justly due and owing to the said A. B., and that the said contracts and orders hereinbefore assigned are subsisting contracts and orders, and in nowise vacated or countermanded, and that he the said A. B. hath not at any time heretofore assigned, released, discharged, or received any of the said debts, effects, and premises, or done any other act whereby or by reason or means whereof the same may be impeached, charged, or incumbered, in anywise howsoever: AND that the said A. B., his executors or administrators, shall and will justify and allow, ratify and confirm all and whatsoever the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, or their or any of their substitutes, shall lawfully do or cause to be done in or about the premises, AND shall and will from time to time and at all times hereafter, at the request and costs and charges of the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, make, do, and execute all or any such further and other acts, deeds, matters, and things, for the further and better empowering and enabling the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, to recover, receive, and get in all or any of the goods, ware, merchandise, stock in trade, debts, effects, and premises hereinbefore assigned, or expressed and intended so to be, as by the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, or his or their counsel in the law, shall be lawfully and reasonably devised and required: AND ALSO, all such acts and things as shall be necessary for putting the said C. D. and E. F. in possession of the full benefit of the said goodwill hereinbefore assigned or intended so to be,

—and to confirm acts of purchasers.

—and for further assurance.

—and for securing to purchasers the benefit of the goodwill

GOODWILL AND STOCK IN TRADE.

by introducing and recommending them to the customers and connexions in business of the said A. B., as by the said C. D. and E. F., or either of them, shall be reasonably required (*i*): AND MOREOVER, that he the said A. B., his

—and not to revoke power or release debts.

(*i*) This covenant should never be omitted in the assignment of a goodwill; for "good-will" is a term so vague in its meaning, that, unless there be some description of the acts to be done to give effect to the assignment, it is difficult for the purchaser to obtain any relief against the vendor for non-performance of the contract. (*Boxon* v. *Farlow*, 1 Mer. 459). It is proper, too, to fix a sum as liquidated damages for breach of the covenant. (See *Shackle* v. *Baker*, 14 Ves. 468; ante, pp. 111, n. (*e*), 134, n. (*r*).) There is no doubt that a goodwill is a subject of sale, and an article of property which may be bequeathed, and is assets in the hands of a personal representative. (1 Nev. & Per. 814; *Giblett* v. *Reade*, 9 Mod. 459; *Worral* v. *Hand*, Peake, N. P. C. 74; *Coslake* v. *Till*, 1 Russ. 376; *Dakin* v. *Cope*, 2 Russ. 170). A contract for the sale even of a professional business, with a covenant to recommend the purchasers to the connexion of the vendor, is valid; (*Bunn* v. *Guy*, 4 East, 190); although Lord Eldon doubted whether professional men could be recommended for a sum of money paid, instead of for skill and knowledge in their profession. (1 Jac. 231). A person, however, who contracts to purchase a goodwill, is left to his remedy at law, and will not be entitled to have a specific performance enforced by a decree of a court of equity, at least when there is no agreement between the parties corresponding to the covenant in the text. (*Bozon* v. *Farlow*, 1 Mer. 459). And it has been said, that in no case will a court of equity compel the specific performance of a contract for the sale of a goodwill. (*Baxter* v. *Conolly*, 1 Jac. & Walk. 580; *Coslake* v. *Till*, 1 Russ. 376; see, however, *Dakin* v. *Cope*, 2 Russ. 170). In one case, in which there was a stipulation, that the vendor should use his endeavours to secure the goodwill to the purchaser by circular letters and other usual means, the Court decreed the specific performance of the agreement to sell the goodwill of a trade, and the exclusive use of a secret connected with it. (*Bryson* v. *Whitehead*, 1 Sim. & Stu. 74). With respect to the exclusive use of a secret of trade, see ante, p. 187, n. (*d*). (*Green* v. *Folgham*, 1 Sim. & Stu. 398; *Carte* v. *Grebye*, 2 Keen, 581).

Validity and means of enforcing a sale of a goodwill.

In an agreement for the sale of a goodwill of a public-house, time is of the essence of the contract; (*Coslake* v. *Till*, 1 Russ. 376); but although the purchaser be decreed to perform the agreement, he cannot be made answerable for the trade carried on between the day in which the purchase ought to have been completed, and the day on which it was completed; and he cannot be compelled to take new stock in trade, which had been substituted for the old. (*Dakin* v. *Cope*, 2 Russ. 170).

GOODWILL AND STOCK IN TRADE.

executors or administrators, shall not nor will revoke or make void (*k*) any of the powers or authorities hereby given to the said C. D. and E. F., or either of them, or their or either of their executors or administrators, or their or any of their substitutes, nor compound, release, or discharge any of the debts, effects, or premises hereinbefore assigned or intended so to be, nor compound, release, avoid, or become nonsuit in any action or suit which may be brought, commenced, or prosecuted, for or in respect of the same or any part thereof, nor do any act or thing whereby or by means whereof the recovery of the same premises or any part thereof may be impeded, delayed, or prevented, nor interfere nor intermeddle with the same premises further or otherwise than the said C. D. and E. F., their executors, administrators, or assigns shall direct or require:

Witnesseth, Secondly,—covenants by purchasers.

AND THIS INDENTURE FURTHER WITNESSETH, that, for further effectuating the said arrangement, and in consideration of the premises, they the said C. D. and E. F. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, hereby covenant with the said A. B., his executors and administrators, that they the said C. D. and E. F., or one of them, their or one of their heirs, executors, or administrators, shall and will, with all convenient speed, well and truly pay or cause to be paid all and every the debt and debts and sum and sums of money due and owing from or by the said A. B., and which appear in the said books of account so delivered by the said A. B. to the said C. D. and E. F. as aforesaid, to be so due or owing from or by the said A. B.: AND shall and will save, defend, keep harmless and indemnified the said A. B., his heirs, executors, and administrators, and his and their estates and effects, of, from, and against all costs, charges, losses, damages and expenses which shall or may be sustained or incurred, or which may become payable for or by reason or means of the non-payment of the said debt or sums of money, or any of them, or any part

—to pay trade debts.

—and indemnify vendor.

(*k*) See supra, n. (*f*).

GOODWILL AND STOCK IN TRADE.

thereof, or for or by reason of any action, suit, account, reckoning, claim, or demand, which shall or may be brought or prosecuted in the name of the said A. B., by virtue of or under any power or authority hereby given, or in pursuance hereof to be given, to the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, or any other person or persons: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the said A. B., his executors or administrators, shall not be entitled to require payment of the debts hereinbefore covenanted to be paid by the said C. D. and E. F., with all convenient speed as aforesaid, or any of them, so long as the said A. B., his heirs, executors, and administrators, and his and their estates and effects, are indemnified and saved harmless, according to the true intent and meaning of the covenant last hereinbefore contained (*l*): AND FOR FURTHER effectuating the said arrangement, he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors and administrators, that he the said A. B. will not at any time or times hereafter, at any place or places within twenty miles

Vendor not to require payment of debts so long as he is indemnified.

Covenant by vendor not to carry on trade within a specified distance.

(*l*) A proviso to this effect should always be inserted, unless it be intended that the covenantor should immediately pay the debts. For where a person sold an estate which was charged with annuities, but which he was not personally liable to pay, and took a covenant from the purchaser to pay the annuities and indemnify the vendor against them, it was held that the vendor could sustain an action for non-payment of the annuities without shewing that he had been damnified by the non-payment. (*Saward* v. *Anstey*, 2 Bing. 519; S. C. 10 J. B. Moore, 55). And of course if there be simply a covenant to pay, and no covenant to indemnify, the covenantee can enforce immediate payment. (*Lethbridge* v. *Mytton*, 2 B. & Ad. 772). So, too, where in a deed an agreement was recited that A. B. should convey certain estates to C. D., and that C. D. in consideration thereof should pay certain debts, and accordingly a conveyance of the estates was made, and C. D. covenanted to indemnify A. B. against the debts; it was held, that the covenant must be construed as a covenant not merely to indemnify against, but also to pay the debts. (*Carr* v. *Roberts*, 5 B. & Ad. 78; see, too, *Huntley* v. *Sanderson*, 1 Cro. & Mee. 47).

Covenant to pay not qualified by a covenant to indemnify.

GOODWILL AND STOCK IN TRADE.

of —— street aforesaid, either solely or jointly with, or as agent for any other person or persons, carry on or be engaged or concerned or interested in the trade or business of ——, or any other trade or business connected with the said trade or business, or allow, permit, or suffer his name to be used or employed in carrying on or in connexion with the said trades or businesses, or any of them, within the distance aforesaid, except only so far as the said A. B., with the consent of the said C. D. and E. F., shall give them his assistance and countenance in carrying on the said business hereby intended to be transferred to them as aforesaid. IN WITNESS &c. (*m*).

Restraints on trading.

(*m*) It has long been well settled that voluntary restraints on trading by agreement between parties, if they amount to a general restraint of trading by either party, are void; but particular restraints of trading, if made upon a good and adequate consideration, and so as the restraint be reasonable, are valid. (*Mitchel* v. *Reynolds*, 1 P. Wms. 181; in which all the earlier cases are cited). It seems, too, to be settled, that the consideration required is simply a good and valuable consideration, such as would support a contract not under seal, and that the Court will not go into the question whether it be adequate in value. (*Hitchcock* v. *Coker*, 1 Nev. & Per. 796; *Leighton* v. *Wales*, 3 Mee. & Wels. 545; *Archer* v. *Marsh*, 2 Nev. & Per. 562). But the question, what is a reasonable restraint, has given rise to much litigation. The test to be applied is the consideration, whether the restraint imposed is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy. (7 Bing. 743). A restraint against trading in a particular place, or within a given distance from it, is reasonable; (*Mitchel* v. *Reynolds*, ubi supra; and cases infra). But the distance which will be deemed reasonable cannot be precisely laid down, and varies with the nature of the trade. (7 Bing. 743, 744). Thus, a restraint on trading as a baker within a particular parish is good. (*Mitchel* v. *Reynolds*, ubi supra). It has been decided, that ten miles from a particular place is a reasonable distance in the case of a surgeon; (*Davis* v. *Mason*, 5 T. R. 118); and twenty miles in the case of an apothecary. (*Haward* v. *Young*, 2 Chit. 407). One hundred miles is unreasonable in the case of a dentist; (*Horner* v. *Graves*, 7 Bing. 735); but 150 miles is allowable in the case of an

What consideration necessary to support.

When reasonable.

attorney. (*Bunn* v. *Guy*, 4 East, 190). Fifty miles seems to be permissible in the case of a dyer. (*Bryson* v. *Whitehead*, 1 Sim. & Stu. 74). An agreement by a servant, that she would not, at any time after she had left the service of her mistress, exercise the trade within half a mile of the residence of her mistress, or in any other house, her mistress, her executors, or administrators should move to, was held valid. (*Chesman* v. *Nainby*, 2 Stra. 739; S. C. 2 Ld. Raym. 1456; and 1 Bro. Parl. Cases, 234). The agreement may, it seems, extend to more than one place; for, where a person had hired himself for a term, as clerk, book-keeper, and traveller, and afterwards, in consideration of being allowed to determine his engagement and enter into partnership with a third person engaged in the same business, agreed not to solicit or take orders in certain specified places at certain times, this agreement was held to be binding. (*Homer* v. *Ashford*, 3 Bing. 322; see, too, *Kimberley* v. *Jennings*, 6 Sim. 340). And an agreement, by three persons, to divide England into districts, and not to trade in each other's districts, is valid. (*Wickens* v. *Evans*, 3 You. & Jer. 318). So, too, an agreement not to be concerned in any coach running from A. to B. is good; and is contravened by being concerned in running a coach from C. to B. through A., C. being a village six miles beyond the town of A. (*Williams* v. *Williams*, 2 Swanst. 253; see, too, *Leighton* v. *Wales*, 3 Mee. & Wels. 545). And so in the case of stage carriers. (*Crutlwell* v. *Lye*, 17 Ves. 335; *Wallis* v. *Day*, 2 Mee. & Wels. 273; *Archer* v. *Marsh*, 2 Nev. & Per. 562).

There is another class of cases, in which the question relates, not to the locality in which the trade is to be carried on, but to the persons for whom and in what manner it is to be conducted. Thus, in *Gale* v. *Reed*, 8 East, 80, on a dissolution of partnership between A., B., and C. C. covenanted to employ A. and B. exclusively to make cordage for his friends, but A. and B. were not to be obliged to work for any other than such as they chose to trust; and this covenant was held to be valid, for C. was still at liberty to work for any of his friends whom A. and B. declined to trust, so that the restraint on C. was only coextensive with the benefit to A. and B., and could therefore be of no prejudice to the public trade. But an agreement by A. not to work for any other person than B., without the consent in writing of B., to be obtained on every occasion, with the exception of persons residing in London or within six miles thereof, is unreasonable; unless B. at the same time bound himself to furnish A. with an adequate quantity of work. (*Young* v. *Timmins*, 1 Cro. & Jer. 331). But a covenant by A. not to exercise the trade of a carrier in his own right, and to serve during his life as assistant to B. in that trade, B. covenanting to pay him a weekly sum, is valid. (*Wallis* v. *Day*, 2 Mee. & Wels. 273). The restriction may be indefinite in point of time. (*Hitchcock* v. *Coker*, 1 Nev. & Per. 796; and see 2 Nev. & Per. 568).

It has been decided, that a contract with the proprietors of a theatre not to write dramatic pieces for any other, is legal; (*Morris* v. *Colman*,

GOODWILL AND STOCK IN TRADE.

18 Ves. 437); but it appears that Lord Eldon considered this as the case of a partnership. (6 Sim. 335, 338). A similar agreement of an author with a bookseller will not be enforced in equity; (*Clarke* v. *Price*, 2 J. Wilson's C. C. 157); and an agreement by an actor to act during a certain time at a specified theatre, and not to act any where else, cannot be enforced by a court of equity as to the positive part, and will therefore not be aided as to the negative part. (*Kemble* v. *Kean*, 6 Sim. 333; see, too, *Kimberley* v. *Jennings*, 6 Sim. 340).

Injunction in restraint of trade on sale of goodwill.

If a goodwill be sold, with an agreement, or covenant, or bond, not to carry on the same business within certain limits, a court of equity will aid the purchaser by granting an injunction against the vendor to restrain him from violating his compact. (*Sloman* v. *Walter*, 4 Bro. C. C. 418; *Hardy* v. *Martin*, 1 Cox, 26; S. C. 4 Bro. C. C. 419, n.; *Barrett* v. *Blagrave*, 5 Ves. 555; *Scott* v. *Mackintosh*, 2 Ves. & Bea. 503; *Williams* v. *Williams*, 2 Swanst. 253). And an injunction will be granted notwithstanding there may be a penalty affixed to the breach of the agreement; (*Sloman* v. *Walter*; *Hardy* v. *Martin*; *Barrett* v. *Blagrave*; ubi supra); but not if the sum to be paid for the breach of the agreement appear to be intended as liquidated damages. (14 Ves. 469; see, too, ante, p. 111, n. (*e*). And even, if the vendor be not restrained from carrying on the business by an express agreement in writing, yet on parol evidence that such was the understanding of the parties, a court of equity will assist the purchaser by injunction. (*Shackle* v. *Baker*, 14 Ves. 468; *Harrison* v. *Gardner*, 2 Madd. 198). But if there be no agreement in writing, and no parol evidence of an agreement that the vendor should not carry on the same business, he cannot be prevented from carrying it on in any place he chooses, however near to the place of the business he has sold. (*Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; see, too, *Kennedy* v. *Lee*, 3 Mer. 441, 452).

The right to enforce an agreement restraining trade may be lost by the covenantee's waiving the benefit of it for a long period. (*Barrett* v. *Blagrave*, 6 Ves. 104). And it seems, that a bill for an account under a covenant in restraint of trade is not usual; the usual course is a bill of discovery for the purpose of an action. (*Scott* v. *Mackintosh*, 2 Ves. & Bea. 503).

XLIII.

CONVEYANCE *in* FEE, *with the* RESERVATION *to the* VENDOR *of the* COAL *and Rights of* MINING (*a*).

CONVEYANCE WITH RESERVATION OF MINES.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*vendor*], of the one part, and C. D., of &c., [*purchaser*], Parties.

(*a*) A tenant in fee-simple is primâ facie entitled to all mines and minerals, except mines of gold and silver. (See the resolution of the Judges, Plowd. 336 a, in the *Case of Mines*, Plowd. 313 a). And it is apprehended that mines and minerals under the ancient highways, and under the strips of waste land on the sides of such highways, belong to the proprietors of the adjacent lands. (See ante, page 60, note (*o*)). Tenant in fee-simple entitled to mines.

All mines of gold and silver, whether in the lands of the crown or of subjects, belong to the crown by prerogative, with liberty to dig and carry away the ores thereof, and with such other incidents thereto as are necessary to be used for the getting of the ore. (Plowd. 336). This would have been of little practical importance if confined to mines of gold and silver only, but, as the law formerly stood, all ores or mines which contained any portion of gold or silver were taken as mines of gold or silver. (Ibid.) Now, however, by the statute 1 Will. & Mary, c. 30, explained by the statute 5 Will. & Mary, c. 6, it is enacted that no mine of copper, tin, iron, or lead shall be adjudged a royal mine, although gold or silver may be extracted out of the same, and the owners of such mines are empowered to work them. But the statute 5 Will. & Mary, c. 6, also provides that the crown may have the ore of such mines, paying for the same according to the rates therein expressed, and which, so far as regards lead, have been altered by the statute 55 Geo. 3, c. 134. (See further Vin. Abr. *Prerogative*, E. c. 3, and K. a; 4 Bac. Abr. 163, 204, 213, and the authorities cited). It has indeed been said that the crown has no power to grant a license to any person to go upon another man's estate, and dig upon his soil, and search for such mines, although when they are once opened the crown can restrain the owner of the soil from working them, and can either work them itself or grant a license for others to work them. (*Lyddal* v. *Weston*, 2 Atk. 19). But this position is liable to considerable doubt, as being inconsistent with Mines of gold and silver belong to the crown.

CONVEYANCE WITH RESERVATION OF MINES.

of the other part: WHEREAS the said C. D. hath contracted and agreed with the said A. B. for the absolute purchase

Recital of contract for purchase.

the resolutions of the Judges in the *Case of Mines*. (Plowd. 310, 336; see, too, 16 Ves. 392). Even if the crown grant lands, and the mines therein contained, common or base mines only will pass, and not mines of gold or silver. (Plowd. 336; 1 Rep. 466, 52. a). But it is said, that if the crown have a royal mine in the lands of A. B., and makes a grant "ex gratia speciali, certa scientia, et mero motu" of all mines in the lands of A. B., the royal mines shall pass. (Plowden, 336, a). Much learning on this subject will be found in the authorities above referred to; but since the statute 1 Will. & Mary, c. 30, it is of little consequence in practice.

The ownership of the mines may subsist independently of the ownership of the soil.

It has been observed that the tenant in fee-simple of the soil is primâ facie entitled to the mines and minerals. But this primâ facie right is liable to be rebutted by evidence that the owner of the soil has not enjoyed the mines and minerals, and that they have been gotten by other persons. (*Rowe* v. *Grenfell*, Ry. & Moo. 396; *Rowe* v. *Brenton*, 8 B. & C. 737: S. C. 3 Man. & Ry. 133). And of course there may be an ownership in fee-simple, or for any less estate of the mines and minerals distinct from the ownership of the soil. (*Harker* v. *Birkbeck*, 1 W. Black. 482; S. C. 3 Burr. 1556; *Houghton* v. *Leigh*, 1 Taunt. 402). A mere license to work mines confers no estate in them. (See 19 Ves. 158). And as to what will constitute a freehold interest in mines, see *Doe* d. *Thompson* v. *Pearce*, (Peake's Add. Cases, 242).

The rights of the owner of mines in another man's land.

The liberty of getting minerals in another man's soil does not confer an exclusive right to the minerals so as to preclude the owner of the soil from also getting them. (*Lord Mountjoy's case*, 1 And. 307; S. C. Godb. 17; 4 Leon. 147; *Chetham* v. *Williamson*, 4 East, 468; S. C. Smith, 277; see, too, *Doe* d. *Earl of Falmouth* v. *Alderson*, 1 M. & W. 210). If mines are excepted out of a conveyance, a right to get the mines and to do all things necessary for obtaining them is excepted also. (Sheppard's Touchstone, 100; 2 B. & C. 207). But this incidental right would warrant nothing beyond what was strictly necessary for the convenient working of the mines; it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the lands of unnecessary persons. It would be questionable at least whether it would authorize a deposit upon the land for the purposes of sale or the introduction of purchasers to view the minerals. (2 B. & C. 211; see, too, as the right of roadway to carry away the minerals, *Simpson* v. *Selwright*, 2 Lutw. 1247). And hence, when minerals are excepted out of a conveyance, it is usual to except all such powers and privileges for the raising, working, and selling them as experience has shewn to be desirable. See the precedent in the text. A person being seised in fee of the manor of F., and the demesne lands

of the closes or parcels of land hereinafter particularly mentioned, and intended to be hereby released, with their

CONVEYANCE WITH RESERVATION OF MINES.

thereof, and of all the coal mines lying under the manor, enfeoffed another of certain closes, except and always reserved to the feoffor, his heirs and *assigns*, all tithes of corn and grain, and also except and always reserved unto the feoffor and his heirs, all the coals under the said closes, "together with free liberty for them, the said (feoffor) and his heirs, and his, and her, and their assigns and servants, from time to time and at all times thereafter during the time that the said (feoffor) and his heirs should continue owners and proprietors of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals in all and every the said lands, woods, grounds, and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their wills and pleasures, he the said (feoffor) and his heirs," making such satisfaction for damages &c. as should be awarded by two arbiters "chosen by the said (feoffee) and (feoffor), their heirs and assigns." The heirs of the feoffor conveyed to a purchaser in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (among other lands) the closes sold to the former feoffee; and on a dispute arising, it was held that the coals under those closes were by the exception reserved to the feoffor in fee, and therefore that they passed from his heirs to the purchaser, and that such purchaser was entitled, under the express liberty reserved, as well as under the incidental right, to enter upon the lands, to dig pits, and get the coals, so long as he remained owner of the demesne lands. (*Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; S. C. 3 Dow. & Ry. 414).

Length of non-user does not destroy a right of mining.

And no length of time is of any avail against an exception or reservation of mines. (*Adair* v. *Shaftoe*, 19 Ves. 156). In the *Earl of Cardigan* v. *Armitage*, ubi supra, the exception was made on a conveyance in 1649, and the working of the mines did not take place till shortly before 1823. In *Seaman* v. *Vawdrey*, on a conveyance in 1704, the salt mines and rights of working had been reserved, but no claim had been made down to 1809, and in 1761 the lands had been conveyed without taking any notice of the reservation. It was, however, held that a purchaser could not be compelled to presume that a release had been made of the mines and rights of working, for that the relinquishment of a right to work mines never could be presumed from the non-exercise of it. (16 Ves. 390; see, too, *Norway* v. *Rowe*, 19 Ves. 144, 156). In *Lyddal* v. *Weston*, (2 Atk. 19), Lord *Hardwicke* held that a purchaser could not object, on the ground of a reservation of mines to the crown on a conveyance 113 years before, there being a strong probability that no mines existed, and his lordship being of opinion that the crown had no power to work the mines even if they did exist. But the authority of this case

COVENANTS WITH RESERVATION OF MINES.

appurtenances and the inheritance thereof, in fee-simple, at or for the price or sum of £——, excepting, nevertheless,

may be greatly doubted. (See 16 Ves. 392, and the former part of this note).

General laws relating to mines.

It has been said that a recovery could not be suffered of mines, because they were not in demesne, but only in profit. (5 Com. Dig. by White, 340). But it is apprehended that although they are not specifically mentioned in the stat. 3 & 4 Will. 4, c. 74, they are included therein under the term "hereditaments." Mines are not titheable of common right, although in some places they are so by custom. (3 Com. Dig. by White, 45). Dower is due of mines wrought during the coverture, either by the husband himself or his lessees, and whether the mines are under the husband's own land, or under the lands of which the soil belongs to others; (*Stoughton* v. *Leigh*, 1 Taunt. 402); a case which enters with considerable minuteness into the method of assigning dower of mines. Dower is not due of any unopened mines. (S. C.)

Rights of tenant for life in respect of mines.

A tenant for life or years may dig and take the profits of mines which are open; (Co. Lit. 54. b.; *Campbell* v. *Leach*, Amb. 740); and may open new pits or shafts for working old veins; (*Clavering* v. *Clavering*, 2 P. Wms. 388); but he cannot open a new mine. (Co. Lit. 53. b., 54. b.; *Campbell* v. *Leach*, *ubi supra*). If there be open mines, and a lease be made of the land and *mines*, this will only comprise the open mines; but if there be no open mine, and a lease is made of the land, together with all mines therein, the lessee may open and work the mines. (Co. Lit. 54. b.; *Saunders' case*, 5 Rep. 12). This principle does not, however, extend to the case of a tenant for life under a settlement where the mines are only mentioned among the general words. (*Whitfield* v. *Bewit*, 2 P. Wms. 240.) See further the notes on mining leases in the next volume of this work.

If lands containing mines be in settlement, it is the duty of the trustees for preserving contingent remainders to take care that the mines are not worked otherwise than the tenants for life, or the persons for the time being entitled to the profits, have power to work them. For it is the duty of such trustees to preserve the inheritance as entire as possible, and that inheritance consisting of the land, timber, and *mines*, cannot be preserved entire without preserving all three. (See Lord *Hardwicke's* judgment in *Garth* v. *Cotton*, Dickens, 196, 202). In a case in which there was a lunatic tenant for life with remainder to his first and other sons in tail, an agreement by the committee of the lunatic that the coal under the lunatic's estate should be worked by the owner of the adjoining land, was established by the Lord Chancellor, but the circumstances of the case were very peculiar. (*Ex parte Tabbert*, 6 Ves. 428).

If a tenant for life make a lease of mines, he cannot have relief against

and reserved out of the said contract or agreement for purchase, all the coal mines, seam and seams of coal, lying

COVENANTS WITH RESERVATION OF MINES.

the lessee, even though the granting of the lease may cause a forfeiture of the life estate, and the remainder-man cannot join the tenant for life against the lessee, but must sue alone. (*Wentworth* v. *Turner*, 3 Ves. 3).

Doctrines of equity in respect of mines.

Mines cannot in ordinary cases be wrought to advantage, or even wrought at all, without a considerable outlay of capital in machinery, and in the making of shafts, levels, and other necessary works. And hence, notwithstanding mines are real estate, they are for many purposes considered in a court of equity as a trading concern. (*Story* v. *Lord Windsor*, 2 Atk. 630; S. C. 1 Cha. Ca. 34; *Wren* v. *Kirton*, 8 Ves. 502; *Jeffereys* v. *Smith*, 1 Jac. & Walk. 298; *Williams* v. *Attenborough*, Turn. & Russ. 70; see, too, 1 Swanst. 518, 3 Atk. 15). A court of equity, too, uses its power of granting injunctions with great caution in the case of mines, because of the irreparable injury which a cessation of working may occasion. (*Anon.* Amb. 209; *Clavering* v. *Clavering*, 2 P. Wms. 388; S. C. 2 Eq. Ca. Abr. 589; 18 Ves. 516). And when a person who claims a right to mines has stood by for a long period, and seen persons at their own expense working the mines, and expending money on them, a court of equity will not interpose by injunction, but will leave the parties to their remedy at law. (*Field* v. *Beaumont*, 1 Swanst. 208; *Parrott* v. *Palmer*, 3 My & Ke. 632). And the same principle is applied as to the appointment of a receiver. (*Norway* v. *Rowe*, 19 Ves. 156). But of course the objection to an injunction does not apply when the mine has not been opened. (*Grey* v. *Duke of Northumberland*, 13 Ves. 236). The reluctance of the court to grant an injunction in the case of mines leads to a relaxation of the general rule, that without an injunction there can be no account. And in mining cases the court will decree an account even if it think fit to refuse the injunction. (3 Atk. 263, 264; *Parrott* v. *Palmer*, 3 My. & Ke. 632; see, too, the cases on these points collected 3 My. & Ke. 634). It should be observed, however, that where a person, having begun to work a mine in his own land, works into that of another, the court will grant an injunction to restrain his proceedings. (*Mitchell* v. *Dors*, 6 Ves. 147).

Mines in copyhold lands.

—to whom they belong.

A copyholder, whether of inheritance or for lives or years only, has a possessory interest in mines; and a copyholder of inheritance or for lives with a positive right of renewal, may, by immemorial custom, have a proprietary right in mines. But without such custom the proprietary right of mines is in the lord; and hence, in the absence of a special custom, neither the tenant without the license of the lord, nor the lord without the consent of the tenant, can open and work mines. (Scriven on Copyholds, 484; Gilb. Tenures, 327; *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; *Bourne* v. *Taylor*, 10 East, 189, and the cases and authorities there cited). The Court of Chancery will grant an injunction against the

COVENANTS WITH RESERVATION OF MINES.

or being in, within, or under, or to be wrought or gotten from, forth, or out of the said closes or parcels of land, or any of them: AND WHEREAS, upon the treaty for the said purchase, it was agreed that the several powers, liberties, and privileges, hereinafter contained, of or relating to the winning, working, taking, leading, and carrying away the said coal mines, seam and seams of coal, should be given or limited to the said A. B., his heirs and assigns, in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration &c., (*supra, p.* 194), he the said A. B. hath granted, aliened, released, and confirmed, and by these presents doth grant, alien, release, and confirm unto the said C. D., (in his actual possession &c., *supra, p.* 198), ALL THOSE the closes or parcels of land,

—that powers of mining should be given to the vendor.

Witnesseth.

Parcels.

opening of a mine by a copyholder, unless a custom be shewn in support of the right. (*Grey* v. *The Duke of Northumberland*, 13 Ves. 206; and see, further, *Lord Cullen* v. *Rich*, Bull. N. P. 102; *Rowe* v. *Brenton*, 8 B. & C. 737; S. C. 3 Man. & Ry. 133; *Lewis* v. *Braithwaite*, 2 B. & Ad. 437; *Parrott* v. *Palmer*, 3 My & Ke. 632; and see the cases cited Ib. 634). In the last case it was attempted to establish, that the law which gave the lord the right to the soil and to whatever lay below the surface of the ground in copyholds, did not extend to customary freeholds, but the point was not decided. It may, however, be observed, that the copyholder is not excluded from all that lies below the surface, for he may dig for marl, for manure, and perhaps for clay. (*Pastor's case*, Winch. 8; 3 My. & Ke. 637). A right in the lord to one class of minerals may exist consistently with a right in the tenant to another class. (*Curtis* v. *Daniel*, 10 East, 273). It is not necessary, for the objects of this publication, to enter into any examination of the evidence which will be required of a customary right; it does not materially differ from that required in respect of other customs. (See *Curtis* v. *Daniel*, and *Rowe* v. *Brenton*, *ubi supra*; *Doe* d. *Mason* v. *Mason*, 3 Wils. 63; *Roe* d. *Bennett* v. *Jeffery*, 2 Mau. & Sel. 92; *Doe* d. *Dauncey* v. *Dauncey*, 7 Taunt. 674; 2 Atk. 189; and Scriven on Copyholds, 570, *et seq.*; *Locke* v. *Colman*, 2 My. & Cra. 635).

The lord of a manor stands in the same situation as any other claimant of mines, if he permit the tenants to work the mines without putting forward his claim; that is, he is left to his remedy at law, and is not entitled to an injunction from a court of equity. (*Parrott* v. *Palmer*, 3 My. & Ke. 652).

hereinafter particularly mentioned, (that is to say), [*parcels—general words*]: To HAVE AND TO HOLD the said closes or parcels of land and hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, unto the said C. D., his heirs and assigns, to the uses, nevertheless, and for the intents and purposes, and under and subject to the declarations and agreements hereinafter limited, expressed, and contained, (that is to say), (*b*):

CONVEYANCE WITH RESERVATION OF MINES.

Habendum to uses.

(*b*) It may be observed, that although, in the precedent in the text, the mines and rights of mining are included in the conveyance, and limited back to the vendor, yet that this course is by no means the usual one. The more common practice is to except and reserve the mines and rights of mining out of the conveyance, and, unless in peculiar circumstances, that form is to be preferred. It was not, however, thought necessary to alter the arrangement of the draft from which the precedent in the text was taken, as the desired alteration can be readily made, and it may in some cases be advantageous to convey and relimit the mines. The following form may serve as an example of the common mode of excepting the mines out of a conveyance:—

Mode of excepting mines from a conveyance of the soil.

"Save and except out of this present conveyance, all mines, quarries of coal and ironstone, and other mines and minerals whatsoever, now found, or at any time or times hereafter to be found, under the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them or any part thereof, with full power and authority for the said [*vendor*], his heirs, assigns, or other the person or persons for the time being entitled to the said mines and minerals and excepted premises, (*this refers to the case of the vendor not being entitled in fee-simple*), and his and their lessees, agents, and workmen, at all times to enter upon the said hereditaments and premises, and every part and parts thereof, to seek and search for the said mines and quarries, and to open and work the same, and erect any steam or other engine or engines, or machinery, and to do all acts necessary for working, winning, washing, and carrying away the said mines, quarries, coal, iron-stone, and other minerals, and also all such other rights of entry, and other rights, privi-

CONVEYANCE WITH RESERVATION OF MINES.

As to the coal and the powers of mining, to the use of vendor in fee.

As to all those the coal mines, seam and seams of coal, lying and being in, within, or under, or to be had, wrought, or gotten from, forth, or out of all those the said several closes or parcels of ground, lands, and hereditaments hereinbefore released, or expressed and intended so to be, together with all such liberties, privileges, and powers of making, sinking, and working pits, shafts, drifts, levels, drains, water-courses, pools, and embankments, and of making, laying, placing, using, and repairing pit-room, heap-room, pit-hills, waggon-ways, branches, and other ways, bridges, mounts, and batteries, and of making, erecting, and repairing hovels, lodges, sheds, whimseys, gins, fire and steam-engines and other engines, edifices, buildings, works, and machinery (*c*) whatsoever, in, under, and upon, through, over and along the said closes or parcels of land and hereditaments hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, as the said A. B., his heirs or assigns, shall deem necessary or proper, convenient or useful, in or for the searching for, winning, working, taking, leading, and carrying away, and selling or disposing

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leges, and easements whatsoever, as shall or may be necessary for the convenient searching for, opening, and working the said excepted mines and quarries, and winning, washing, dressing, making merchantable, and carrying away the produce of the said mines and quarries, the owner or owners of the said excepted mines and quarries making, from time to time, nevertheless, unto the said [*purchaser*], his heirs and assigns, his and their tenants and lessees, adequate compensation for the damage to be occasioned to the surface of the said hereditaments and premises by the exercise of the rights, privileges, and easements hereby excepted and reserved as aforesaid."

With respect to the nature of the exception of mines and mining powers, see the observations of *Bayley*, J., in the *Earl of Cardigan* v. *Armitage*, 2 B. & C. 206.

(*c*) Care should be taken that the appropriate local technical terms, as well as general terms, be employed.

CONVEYANCE WITH RESERVATION OF MINES.

of the same coal mines and seam and seams of coal, and the coal to be gotten or raised therefrom, or any part thereof respectively (*d*), subject nevertheless to the observance, performance, and fulfilment of the several covenants, conditions, and agreements hereinafter contained, and on the part of the said A. B., his heirs and assigns, to be observed, performed, and fulfilled, to the use of the said A. B., his heirs and assigns for ever: AND AS TO the said several closes or parcels of land, hereditaments, and premises hereinbefore released, or expressed and intended so to be, other than the said coal mines, seam and seams of coal, liberties, privileges and powers, hereinbefore given or limited to the use of the said A. B., his heirs and assigns, To the use of the said C. D., his heirs and assigns, for ever: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, in manner following, (that is to say), that he the said A. B., his heirs and assigns, shall not nor will sink, or cause to be sunk, any pit, shaft, drift, or level, which shall or may weaken, damage, injure, or endanger any house or other building belonging to the said C. D., his heirs or assigns, or for the time being standing or being in or upon the said closes or parcels of land hereinbefore limited to the use of the said C. D., his heirs and assigns, or any part thereof, nor sink any pit, nor place or lay any waggon-way or other way, nor make any other works whatsoever, within or upon any garden or orchard belonging to any such house or building within the distance of twenty yards from such house or building (*e*): AND ALSO THAT he the said A. B., his heirs or assigns, shall and will, yearly and every year, make, or cause to be made, unto the said C. D., his heirs or assigns, satisfaction for the spoil or damage of ground to be made, done, or occasioned, to, in, or upon the said several closes or parcels of ground, lands,

As to the other premises to the use of purchaser in fee.

Covenant by vendor not to sink mines near houses or gardens.

—and annually to make compensation for damage done.

(*d*) It may be doubted, whether the subsequent words down to "fulfilled," are desirable. It is, perhaps, better to leave the stipulations of the covenants to rest on covenant alone, and not to make the enjoyment of the powers dependent on the fulfilment of the covenants.

(*e*) See infra, n. (*f*).

CONVEYANCE WITH RESERVATION OF MINES.

and premises hereinbefore limited, to the use of the said C. D., his heirs and assigns, or any part thereof, by the searching for, winning, working, leading, taking, and carrying away of the said coal mines, seam and seams of coal, hereinbefore limited to the use of the said A. B., his heirs and assigns, or any part thereof, or by the sinking or working of any pit or shaft, or by the making or using of pit-room, heap-room, or pit-hills, or by the making, erecting, laying, or building of any waggon-way or waggon-ways, branches, or other ways, bridges, mounts, or batteries, or by repairing the same, or any of them, or by the making, placing, erecting, building, or using of any hovels, lodges, sheds, whimseys, gins, fire or steam engines, or other engines or machinery, or otherwise, by virtue of or under the liberties, privileges, and powers hereinbefore given and limited to the use of him the said A. B., his heirs and assigns, as aforesaid, such satisfaction to be estimated and fixed at a certain yearly rent or sum of money by the acre, for every acre of the same closes or parcels of ground and lands to, in, or upon which any spoil or damage shall be made, done, or occasioned by any of the ways or means aforesaid, and so in proportion for any greater or less quantity than an acre of ground, and which yearly rent or rents, sum or sums of money, to be estimated and fixed as and for such satisfaction as aforesaid, shall be payable and paid upon the first day of January in every year, and shall continue payable so long and during such time as the works so to be made, laid, placed, or erected for the purposes aforesaid shall be used or continued, and until such pits, shafts, pit-room, heap-room, pit-hills, waggon-ways, branches, and other ways, bridges, mounts, batteries, hovels, lodges, sheds, whimseys, gins, fire and steam engines, and other engines, machinery, and other erections, and the stock and rubbish to be thereby made or occasioned shall be completely filled up, removed, or taken away respectively, and until the lands and grounds to, in, or upon which any spoil or damages shall be made, done, or occasioned as aforesaid, shall be levelled and made fit and proper for tillage: AND FURTHER, THAT the said A. B.,

—and restore to

CONVEYANCE WITH RESERVATION OF MINES.

his heirs or assigns, shall and will from time to time, at his and their own proper costs and expenses, fill up, or cause to be filled up, every pit or shaft which shall be sunk or made in the said closes or parcels of land and hereditaments hereinbefore limited to the use of the said C. D., his heirs and assigns, and which the said A. B., his heirs or assigns, shall cease to get coal in, or to use immediately after every such pit or shaft shall so cease to be wrought, and shall be of no further use, and also remove, take, and lead away all the said pit-heaps, pit-hills, waggon-ways, branches, and other ways, bridges, mounts, batteries, hovels, lodges, sheds, whimseys, gins, fire or steam engines and other engines, machinery, and erections whatsoever, immediately after the same respectively shall be discontinued, and of no further use for the purposes aforesaid, and also the materials thereof, and the stock or rubbish to be made or occasioned thereby, and also shall and will thereupon, at the expense of the said A. B., his heirs or assigns, trench and level, or cause to be trenched and levelled in a proper and workmanlike manner, such part or parts of the same closes of land and hereditaments as shall have been used or occupied by or for all or any of the purposes aforesaid, under or by virtue of any of the liberties, privileges, and powers hereinbefore given or limited as aforesaid, or as shall have been damaged or spoiled in manner hereinbefore mentioned, and also lay and spread the soil and earth on the same lands and grounds, and do every other act and thing which shall be requisite or proper for the making of the same closes of land and hereditaments fit for tillage: AND MOREOVER, THAT he the said A. B., his heirs and assigns, shall and will, from time to time and at all times, as occasion shall require, set up, hang, fix, make, erect, and keep good and sufficient gates, rails, bars, or posts, with locks and keys, upon and across such waggon-ways and other ways, as shall be laid or made under or by virtue of the powers and liberties hereinbefore given or limited to him and them as aforesaid, in or upon any of the said closes of land and hereditaments hereinbefore limited to the use of the said

the usual condition, land which has been used for mining purposes, but is no longer required.

—and erect gates and fences.

CONVEYANCE WITH RESERVATION OF MINES.

C. D., his heirs and assigns, and in all other places whatsoever where the same shall be necessary or proper to shut up and inclose any breach, gateway, or opening, which the said A. B., his heirs or assigns, shall from time to time make in the hedges, walls, or fences of the same closes of land and hereditaments, or any part thereof, and shall and will sufficiently rail, pale, or otherwise fence off on all sides, all and every the waggon-ways, bye-ways, and other ways, pits, shafts, pit-heaps, pit-hills, bridges, mounts, batteries, hovels, lodges, sheds, whimseys, gins, engines, machinery, erections, and works whatsoever, which shall at any time hereafter be made, laid, or placed by him the said A. B., his heirs or assigns, in and upon the said closes of land and hereditaments, or any part thereof, where the railing and paling or fencing of the same shall be necessary or proper, and shall and will maintain and keep the aforesaid gates, rails, bars, posts, locks, keys, pales, or fences, in good and sufficient repair and condition, and shall and will, from time to time and at all times, provide and keep sufficient gate-keepers or proper persons to attend, look after, and keep shut and locked, or fastened, the same gates, bars, or rails, to prevent, as much as may be, trespasses by cattle or other animals on the same lands and grounds, and every part thereof, and also shall and will, from time to time and at all times hereafter, when and so often as there shall happen to be any damage made or done by cattle or other animals, by trespassing in or upon any of the said closes of land and hereditaments hereinbefore limited to the use of the said C. D., his heirs and assigns, or by such cattle or other animals injuring themselves, by means or occasion of the making of such breach or breaches, gateways or openings, or by or through the not keeping the said gates, bars, or rails shut up, locked, or fastened, make reasonable satisfaction for the same to the said C. D., his heirs or assigns, or to the person or persons injured thereby: AND FURTHER, THAT it shall be lawful for the said C. D., his heirs and assigns, from time to time and at all times hereafter, to make, lay, and use, for any purpose or purposes whatsoever, any waggon-way or ways, or other way or ways

—and that it shall be lawful for landowners to make ways across the ways of the mine owner.

CONVEYANCE WITH RESERVATION OF MINES.

over and across any of the waggon-ways or other ways to be made, laid, or used in or upon the same lands and grounds, or any part thereof, by the said A. B., his heirs or assigns, by virtue or in pursuance of the liberties, privileges, and powers, hereby to him and them given and limited as aforesaid, the said C. D., his heirs or assigns, in the use and exercise of the liberties and powers hereinbefore given or reserved to him or them, not interrupting or obstructing, more than the nature of the case shall require, the waggon-way or other ways so to be made, laid, and used by the said A. B., his heirs or assigns as aforesaid: AND ALSO, THAT it shall be lawful for the said C. D., his heirs and assigns, from time to time and at all times hereafter, to pass and repass upon or along, over or across such waggon-ways, or other way or ways, as shall or may at any times hereafter be made or laid in or upon the same closes of land, hereditaments, and premises, or any part thereof, under or by virtue of the liberties, privileges, and powers hereinbefore given or limited to the use of the said A. B., his heirs and assigns, or any of the same ways or any part thereof, to and from the same closes of land, hereditaments, and premises, or any part thereof, as well on foot and on horseback as with horses, sheep, cattle, carts, waggons, and carriages, loaden or unloaden, or any of them, as shall be useful or convenient to them, or any of them, in or for the management, cultivation, or improvement of the same closes of land, hereditaments, and premises, or any part thereof, so as that in passing and repassing upon, along, over, or across the same waggon-ways or other ways, or any part thereof, the said A. B., his heirs or assigns, be not disturbed or interrupted in using and exercising the liberties, privileges, and powers hereinbefore to him and them given or limited, more than the nature of the case shall require, and so that the same waggon-way or other ways shall be as little damaged as may be thereby(*f*): AND EACH of them the said A. B.

—and to use mine owner's ways.

Arbitration clauses.

(*f*) On a conveyance to a purchaser in fee of a messuage, buildings, homestead and lands, the coal-mines were excepted, with liberty to enter and sink pits for getting the coal, and to erect engines, and make

As to restrictions on rights of mining.

CONVEYANCE WITH RESERVATION OF MINES.

and C. D., so far as relates to the acts and deeds of himself, his heirs and assigns (*g*), doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the other of them, his heirs and assigns, in manner following, (that is to say), THAT if any doubt, difference, or dispute shall at any time or times hereafter arise between the said A. B. and C. D., or their respective heirs or assigns (*h*) or any of them, respectively, touching the land or ground, or other matters in respect of which satisfaction ought to be made, in pursuance of the covenants hereinbefore contained, or any of them, or touching

Agreement to refer to arbitration.

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drains, &c., for working the coal, *except as to such lands as lay within 150 yards of the messuage and buildings, and except any homestead.* On the construction of this conveyance, it was held, that the vendor had reserved to himself the right to dig coals under the messuage, buildings, and homesteads, and within 150 yards of the same respectively, but that he had not the right to sink pits, erect engines, and make drains within 150 yards of the messuage or buildings, or within the homestead. (*Bowler* v. *Wolley*, 15 East, 444). Questions of this nature, for the most part, may and ought to be avoided by care on the part of the draftsman; but, questions of fact sometimes arise, which can only be settled by extrinsic evidence. As, for instance, what constitutes a garden? (*Gilbert* v. *Tomison*, 4 Dow. & Ry. 222). See, further, with respect to the extent and duration of a grant of powers of mining, *Hodgson* v. *Field*, 7 East, 613; S. C. 3 Smith, 538. And with respect to the usual parliamentary restrictions on mining operations in the neighbourhood of canals, see *Dudley Canal Navigation Company* v. *Grazebrook*, 1 B. & Ad. 59; and the cases there cited.

Inutility of arbitration clauses.

(*g*) The utility of these prospective references to arbitration is very doubtful, for it is next to impossible so to frame them as to render them applicable to the complicated interests which are commonly carved out of real estate. The clauses have, however, been retained, in deference to custom, and an endeavour has been made to render them more available in practice than the usual forms. But it is proper to observe, that, according to the most approved practice of conveyancers at the present time, arbitration clauses are only inserted in deeds of this nature in obedience to instructions.

(*h*) It may, perhaps, be fitting to add here in parentheses,

"(including lessees, tenants, or occupiers, and their representatives)."

CONVEYANCE WITH RESERVATION OF MINES.

the amount or quantum of such satisfaction, or touching the construction of these presents, or any matter or thing whatsoever in any wise relating to the premises, then and in such case, and so often as the same shall happen, such doubt, difference, or dispute shall be reduced into writing, and be submitted and referred to the arbitration of three indifferent persons, one to be from time to time chosen by each of the two parties so doubting, differing, or disputing, within one calendar month after either of them shall have made to the other a requisition to that effect ,and the third to be named by the two persons from time to time first chosen, within one calendar month after they shall have been themselves chosen: AND FURTHER, THAT if either of the parties so doubting, differing, or disputing as aforesaid, shall, by any writing under his or their hand or hands, require the other of the said parties to submit and refer the same to arbitration, and in pursuance of the covenant lastly hereinbefore contained to name some person as arbitrator, and if the party to whom such requisition shall be made, shall, for the space of one calendar month after such requisition, neglect or refuse to comply therewith, then and in such case, and so often as the same shall happen, it shall be lawful for the person chosen to be arbitrator on behalf of the party making such requisition, by any writing under his hand to appoint some person to act as arbitrator, on behalf of the party so refusing or neglecting as aforesaid, and that such two persons shall name a third arbitrator as aforesaid: AND FURTHER, THAT (*i*) it shall be lawful for the said arbitrators or any two of them to arbitrate, determine, and award, of and concerning all and every the matters and things touching which such doubt, difference, or dispute as aforesaid shall have arisen, and, (if they or any two of them shall see fit so to do), at the expense of the parties in difference or one of them, to require the aid and take the opinion of any surveyor or surveyors, or counsel or other person or persons, and to adopt such other measures, and give

Power to arbitrators to hear and determine.

(*i*) See the notes, supra, pp. 126—133, inclusive, as to the object and effect of the subsequent provisions; and see *Hetherington* v. *Robinson*, 4 Mee. & Wels. 608.

CONVEYANCE WITH RESERVATION OF MINES.

all such directions as shall appear to the said arbitrators or any two of them advisable or expedient: AND FURTHER, THAT the parties so doubting, differing, or disputing as aforesaid, and all persons claiming by, from, through, or under them respectively, shall in all things obey, abide by, observe, and perform the award, order, and determination of the aforesaid arbitrators, or of any two of them, so as the award of the said arbitrators or of such two of them as shall concur be made in writing under their hands, and be ready to be delivered to the said parties respectively, or such of them as shall desire the same, within three calendar months next after the third of such three arbitrators for the time being shall have been named:

Agreement to abide by the award.

Agreement to be examined as witnesses, and to produce evidence.

THAT THE SAID parties so doubting, differing, or disputing as aforesaid, and all persons claiming by, from, through, or under them respectively, will, if required by the said arbitrators, or any two of them, attend personally and submit to be examined relative to the matters in doubt, difference, or dispute, and will produce to and deposit with the said arbitrators, or any two of them, all such deeds, evidences, letters, papers, and writings, relative to the matters in doubt, difference, or dispute, as shall be in the possession or power of the said parties respectively, or their respective heirs, executors, or administrators, and as the said arbitrators, or any two of them, may wish to peruse or inspect, and will, so far as in them respectively may lie, furnish or cause to be furnished all such documents, proofs, and evidence, and do or cause to be done all such acts and things for better enabling them to make the said award, as the said arbitrators, or any two of them, shall require:

That evidence may be taken on oath.

THAT THE SAID parties respectively, and all persons claiming by, from, through, or under them respectively, if examined, and all other witnesses who shall be produced to give evidence before the said arbitrators, or any two of them, of and concerning the premises, (if required by the opposite party, or the party against whom such witness shall be produced), and also any surveyor or surveyors, or other person or persons (except counsel) who may be called upon by the said arbitrators, or any two of them, as afore-

CONVEYANCE WITH RESERVATION OF MINES.

said, shall (if the same shall be thought proper by such arbitrators) be examined upon oath or upon their affirmation in cases where affirmation is allowed by law instead of oath: THAT THE costs, charges, and expenses of and attending, or in anywise relating to any arbitration, including the compensation to be made to the arbitrators for their trouble, and the fees and compensation to be made to any surveyor or surveyors, counsel, or other person or persons who may be called on as aforesaid, shall be in the discretion of the said arbitrators, or any two of them, who shall direct by whom and to whom, and in what manner, the same shall be paid, and who shall be at full liberty, if they see fit, to direct that any of such costs and expenses shall be reckoned as between attorney and client, and not as between party and party: AND THAT any submission or reference to arbitration, under or by virtue of these presents, shall or may be made a rule of any of her Majesty's courts at Westminster, according to the statute in that case made and provided, if any such court shall so please, and either party shall be at liberty to apply to the said court for that purpose, and to instruct counsel to consent thereto for the other party. [*Covenants for title by A. B. with C. D., his heirs and assigns; see supra, Precedent XVI. p.* 201, *confining the covenants to* "the closes of land, hereditaments, and premises hereinbefore limited to the use of the said C. D., his heirs and assigns."] IN WITNESS &c.

That arbitrators shall have power to give costs.

That any submission to arbitration may be made a rule of court.

XLIV.

BANKRUPT'S FREEHOLD ESTATE.

CONVEYANCE *by the* MORTGAGEES *and* ASSIGNEES *and the* OFFICIAL ASSIGNEE *of a* BANKRUPT (*a*).

Parties.

THIS INDENTURE, made &c. BETWEEN E. F., of

Disposition under statute 6 Geo. 4, c. 16, of a bankrupt's personal estate.

—and real estate.

(*a*) It is enacted by the statute 6 Geo. 4, c. 16, s. 63, that the commissioners under a commission in bankruptcy shall assign to the assignees for the benefit of the creditors all the present and future personal estate of the bankrupt, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate, and all debts due to the bankrupt, and which are made recoverable by the assignees. By sect. 64 of the same statute, it is enacted, that the commissioners shall by deed indented, and inrolled in any of His Majesty's courts of record, convey to the assignees, for the benefit of the creditors, all lands, tenements, and hereditaments, (except copy or customary hold), in England, Scotland, Ireland, or any of the dominions, plantations, or colonies belonging to His Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed; and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert, or come to such bankrupt before he shall have obtained his certificate. And by the same section it is provided, that the conveyance by the commissioners shall be registered in any colony whose laws require registration. By section 66, the Lord Chancellor is empowered to order any conveyance or assignment made to the assignees of either the real or personal estate to be vacated, but so that no title of any purchaser prior to such order be thereby affected, and to order a new conveyance and assignment to be made. And it is enacted, that the order for the new assignment shall have the effect of vesting the debts and personal estate in the assignees, and that the new conveyance shall be valid without a conveyance from the former assignees. The conveyance by the commissioners to the assignees was made by a common law bargain and sale, (see ante, p. 197, n.), and the assignees had no title whatever to the bankrupt's property, real or personal, until the assignment or bargain and sale was actually executed. Then as to per-

&c., [*one of two first mortgagees*], of the first part; A. B., of &c., and C. D., of &c., [*the executors appointed by the will*

BANKRUPT'S FREEHOLD ESTATE.

sonal property their title related back to the act of bankruptcy, but as to real property, although the assignees were beneficially entitled to, and might claim and recover all lands of which the bankrupt was seised at the time of the act of bankruptcy, or afterwards, yet the legal estate remained in the bankrupt until actually conveyed to the assignees by bargain and sale. (*Doe* d. *Esdaile* v. *Mitchell*, 2 Mau. & Sel. 446; *Lloyd* v. *Lander*, 5 Madd. 282; Arch. Bank. Law, p. 154, 6th edit.)

Disposition under the statute 1 & 2 Will. 4, c. 56, of the personal estate;

The law, however, has been most materially altered by the statute 1 & 2 Will. 4, c. 56. For, by sect. 25 of that statute it is enacted, that when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws then in force might be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in, and transferred to, the assignees or assignee for the time being by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees, and the survivor of them; and as often as such assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose. And by sect. 26 of the same statute it is enacted, that where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the united kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty, as by the said act (6 Geo. 4, c. 16) is directed to be conveyed by the commissioneers to the assignees, shall vest in such bankrupt or assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose. It is provided, however, (sect. 27), that where the conveyance or assignment would have been required to be registered, the certificate of the appointment of the assignees must be registered.

—and the real estate.

Sale of the bankrupt's property.

The property of the bankrupt being thus vested in the assignees, it is their duty to sell and convert it into money. It may be sold either by public auction or by private contract. (*Ex parte Dunman*, 2 Rose, 66; *Ex*

BANKRUPT'S FREEHOLD ESTATE.

of G. H., *deceased, the other first mortgagee*], of the second part; J. K., of &c., [*second mortgagee*], of the third

parte Ladbroke, 1 Mon. & Ayr. 384). The assignees, and not the court or the commissioners, or even the creditors, are the judges of the propriety and expediency of the sale, for the risk and the responsibility attaches on the assignees. (*Ex parte Comings*, 1 Ves. Jun. 112; *Ex parte Montgomery*, 1 Glyn. & J. 338; *Ex parte Hurly*, 2 Dea. & Ch. 631; *Ex parte Belcher*, 3 Dea. & Ch. 87; S. C. 1 Mon. & Ayr. 478). But an assignee, it seems, has no power to defer a sale. (*Ex parte Goreing*, Cooke, B. L., 289; 6 Ves. 622). And although assignees may have a reference to a commissioner, to report whether a contract made by the assignees for the sale of the bankrupt's property would be advantageous to the estate, yet this merely gives a prima facie sanction to the contract, and will not protect the assignees against the creditors if the contract turn out to be disadvantageous. (*Ex parte Jeffery*, 1 Dea. & Ch. 206; *Ex parte De Begni*, 1 Mont. & Ayr. 277; *Ex parte Bradstock*, 1 Dea. 272; and cases there cited, n. (*a*), p. 273). Neither the assignees, nor any other persons concerned in the sale or management of the bankrupt's estate, will be allowed to purchase any part of it without the consent of the creditors and the permission of the court. (See the cases collected, Arch. Bank. Law, 229, 6th edit.; and *Ex parte Alexander*, 1 Dea. 273; *Ex parte Briggs*, 3 Dea. 239). Assignees must make out a good title, like any other vendor; (*White* v. *Foljambe*, 11 Ves. 343; *Macdonald* v. *Hanson*, 12 Ves. 277; overruling *Pope* v. *Simpson*, 5 Ves. 145); unless they protect themselves by special stipulations; (*Freme* v. *Wright*, 4 Madd. 364); or unless the purchaser by his conduct waive his right to a good title. (*Ex parte Sidebotham*, 3 Dea. & Chit. 818; S. C. 1 Mon. & Ayr. 655, and 1 Dea. 4). The Court of Bankruptcy has no jurisdiction over a purchaser from the assignees; (*Ex parte Holder*, 1 Mont. & Ayr. 518; see, too, infra, p. 418); nor has the Chancellor sitting in bankruptcy any jurisdiction over a purchaser of the bankrupt's property, or over any person who has not submitted to the commission. (*Ex parte Holder*, 1 Mon. & Ayr. 518; *Lautour* v. *Holcombe*, 8 Sim. 76; *Ex parte Cuth.*, 3 Dea. 242). And even when a purchaser, or other stranger to the commission, is willing to be bound by the judgment in bankruptcy, his submission will not always be accepted. (*Ex parte Bennett*, 10 Ves. 381). It is apprehended, that a person submitting to the jurisdiction would not be bound to accept an equitable title, but would be taken to stand in the same situation as if a bill had been filed against him for a specific performance. (*Cann* v. *Cann*, 1 Sim. & Stu. 284).

If, after a sale has been made by two out of three assignees, the third assignee refuses to convey, it seems that the Court of Bankruptcy has power to compel him to convey, but that it will not exercise that power

part; L. M., of &c., and N. P., of &c., [*assignees of the estate and effects of* Q. R., *deceased, under a fiat in bank-*

BANKRUPT'S FREEHOLD ESTATE.

without a reference to the registrar. (*Ex parte Underhill*, 3 Dea. 326). It is usual to make the bankrupt join in the conveyance for the purpose of preventing any question being afterwards made as to the validity of the fiat. And by stat. 6 Geo. 4, c. 16, s. 78, the Lord Chancellor is empowered, upon the petition of the assignees, or any purchaser from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the commission (fiat), or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in any conveyance of such estate, or any part thereof; and it is declared, that if he shall not execute such conveyance within the time directed by the order, he, and all persons claiming under him, shall be estopped from objecting to the validity of such conveyance, and all the estate, right, or title of the bankrupt shall be as effectually barred by such order as if such conveyance had been executed by him. (See *Ex parte Jackson*, 2 Dea. & Chit. 458; *Ex parte Brown*, 2 Dea. 479; *Ex parte Thomas*, 2 Glyn & Jam. 278). Purchasers under a fiat in bankruptcy are also protected against defects in the fiat or proceeding, unless the bankrupt, or the persons claiming under him, shall have proceeded to impeach the fiat within twelve months from its date. (6 Geo. 4, c. 16, s. 87). This clause, however, does not protect a purchaser under a fiat which has been annulled against the assignees under a subsequent fiat. (*Gould* v. *Shoyer*, 6 Bing. 738).

Concurrence of the bankrupt in the conveyance.

When the bankrupt is a party to the conveyance, he is usually made to enter into covenants for title with the purchaser; but if he decline to do so, of course there is no power to compel him, as he is not obliged to execute any conveyance at all unless he pleases. (See 1 Dea. 480). The right to bring an action of covenant against the bankrupt for unliquidated damages is not barred by the certificate. (*Attwood* v. *Partridge*, 4 Bing. 209; and the cases cited, Arch. Bank. Law, 109, 6th edit.)

The purchase-money in country bankruptcies (where there is no official assignee) is paid to the creditors' assignees; and care must be taken to have a receipt from all the assignees, because the receipt of one only of the assignees is not a valid discharge. (*Can* v. *Read*, 3 Atk. 693; see, however, the cases at Nisi Prius, of *Smith* v. *Jameson*, 1 Esp. 114; *Bristow* v. *Eastman*, Id. 174). In a town bankruptcy, the purchase-money is to be paid to the official assignee under the fiat, unless the Court of Bankruptcy, or any judge or commissioner thereof, shall otherwise direct. See statute 1 & 2 Will. 4, c. 56, s. 22, and the next precedent; and see *Ex parte Whisson*, 3 Dea. 646.

There is no peculiar form for the conveyances of assignees; they convey and covenant in the same manner as other trustees. But by the statute 6 Geo. 4, c. 16, s. 77, it is enacted, that all powers vested in any

BANKRUPT'S FREEHOLD ESTATE.

ruptcy], and S. T., of &c., [*the official assignee under the same fiat*], of the fourth part; and U. V., of &c., [*pur-*

Recital of conbankrupt, which he might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of the creditors in such manner as the bankrupt might have executed the same. In case of the exercise of such a power, it is proper to make the assignees, and the bankrupt also if he will join, appoint "pursuant to, and by force and virtue, and in exercise and execution of the power or authority to the said [*bankrupt*], for this purpose given as hereinbefore is mentioned, and of all other powers or authorities in anywise enabling them, the said [*assignees*] and [*bankrupt*], or any of them in this behalf." If, in default of appointment, the estate was limited to the bankrupt, he could not exercise his power after a sale by the assignees, even if the assignees had only conveyed instead of appointing. (*Doe* d. *Coleman* v. *Britain*, 1 B. & Ald. 93; see, too, *Badham* v. *Mee*, 1 My. & Ke. 32; and the remarks thereon, 1 Sugd. Pow. 80; 3 Mee. & Wels. 675, 676; *Hole* v. *Escott*, 2 Keen, 444; reversed by the Lord Chancellor, Nov. 24th, 1838; *Jones* v. *Winwood*, 3 Mee. & Wels. 653).

Leasehold estates of bankrupt.

Some remarks with respect to the leasehold estates of bankrupts will be found in the notes to the next precedent, infra, page 422; but it will be needful here to refer to certain kinds of estates which do not vest in the assignees, and for the disposition of which a particular provision is made.

Estates tail of bankrupt.

By the statute 6 Geo. 4, c. 16, s. 65, the commissioners were empowered to dispose of the estates tail of bankrupts. This statute is still in force with regard to the entailed estates of persons made bankrupt before the 31st of December, 1833, but it is repealed for all other purposes by the statute 3 & 4 Will. 4, c. 74, s. 65. The entailed estates of all persons made bankrupt under fiats issued since the 31st of December, 1833, are subject to the enactments of the last-mentioned statute, (ss. 55 to 67 inclusive), the effect of which is to give the commissioners the same powers of disposition as the bankrupt himself might have had if he had not become bankrupt.

Copyholds.

The copyhold and customary estates of bankrupts were always conveyed to the purchaser directly, (see *Ex parte Holland*, 4 Mad. 483), and were excepted from the conveyance prescribed by the stat. 6 Geo. 4, c. 16, s. 64, because, if the commissioners had conveyed to the assignees, the assignees must have been admitted and paid a fine before they could have surrendered to the purchaser. And the copyholds, being thus excepted, of course do not vest in the assignees by virtue of the 26th section of the 1st & 2nd Will. 4. They remain subject to the enactment contained in the stat. 6 Geo. 4. c. 16, s. 68, which empowers the commissioners, by deed indented, and inrolled in any of his Majesty's

chaser], of the fifth part: WHEREAS, by indentures of lease and release, bearing date respectively the 10th and 11th

BANKRUPT'S FREEHOLD ESTATE.

courts of record, to make sale for the benefit of the creditors of any copyhold or customaryhold lands, or of any interest to which any bankrupt is entitled therein, and thereby to entitle or authorize any person or persons on their behalf to surrender the same for the purpose of any purchaser or purchasers being admitted thereto. The 69th section of the same statute directs that every purchaser shall, before he enter into or take any profit of the same, agree and compound with the lords of the manors for the fines, dues, and other services, and thereupon the said lords shall, at the next or any subsequent court to be holden for the said manors, grant unto such vendee, upon request, the said copy or customary lands or tenements for such estate or interest as shall have been so sold to him as aforesaid, reserving the ancient rents, customs, and services, and shall admit him tenant of the same.

Conveyance in favour of bankrupt.

It must be observed, that, on sales by the commissioners, the purchase-money must be paid to the assignees, (or, in towns, to the official assignee), and they should be parties to the conveyance, in order that they may give a receipt for the purchase-money. For the form of a conveyance by the commissioners see the precedent of a bargain and sale by executors, supra, Precedent XXXV. p. 319.

Mortgaged estates of bankrupt.

If at the time of the bankruptcy any of the real or personal estate of the bankrupt be in mortgage, either by way of legal or equitable mortgage, the equity of redemption vests in the assignees by virtue of their appointment; and by the stat. 6 Geo. 4, c. 16, s. 70, they are authorized to redeem the property, and dispose of it for the benefit of the creditors. (See *Dunn* v. *Massey*, 6 Ad. & El. 479). The mortgagee's right to foreclose is not affected by bankruptcy, and if he have a power of sale he may exercise it, and, after retaining the amount of his debt and expenses, pay the surplus to the assignees; but he cannot himself be a purchaser at the sale. (*Ex parte Francis*, 1 Dea. & Chit. 374; *Ex parte Davis*, 1 Mon. & Ayr. 89; S. C. 3 Dea. & Chit. 504). If, however, the mortgagee have not a power of sale, or have doubts as to the sufficiency in value of his security, his proper way is to proceed under the authority of Lord *Loughborough's* order of the 8th of March, 1794. By this order it is directed "that, upon application to the major part of the commissioners named in any commission* of bankruptcy by any person or persons claiming to be a mortgagee or mortgagees of any part of the bankrupt's estate or effects, the said commissioners shall proceed to inquire whether such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's

* This must now be understood to mean the commissioner or commissioners under any fiat of bankruptcy.

BANKRUPT'S FREEHOLD ESTATE.

days of October, 1821, the release being made or expressed to be made between [*parties*], the piece or parcel of land

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estate or effects, and for what consideration, and under what circumstances; and if the commissioners shall find such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's estate and effects, and no sufficient objections shall appear to the title of such mortgagee or mortgagees to the sum claimed by him or them under such mortgage or mortgages, that the commissioners do then proceed to take an account of the principal, interest, and costs due upon such mortgage or mortgages, and of the rents and profits of the mortgaged premises received by such mortgagee or mortgagees, or by any other person or persons, by his, their, or any of their order, or for his, their, or any of their use, in case such mortgagee or mortgagees shall have been in possession of the mortgaged premises, or of any part thereof, and that the commissioners do then cause due notice to be given in the London Gazette, and in such other of the public papers as they shall think fit, when and where the said mortgaged premises are to be sold before them, or by public auction at any other place or places if they shall so think fit, and that such sale be made accordingly." The order proceeds to direct "that all proper parties shall join in the conveyance or conveyances to the purchaser or purchasers as the said commissioners shall direct, and that the monies to arise from such sale shall be applied in the first place in payment of the expense attending such sale, and then in payment and satisfaction of what shall be found due to such mortgagee or mortgagees for principal, interest, and costs, and that the surplus of the said monies (if any) be paid to the assignees of the estate and effects of the said bankrupt; but in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be found due to such mortgagee or mortgagees, that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency, and to receive a dividend or dividends thereon out of the bankrupt's estate or effects, rateably and in proportion to the rest of the creditors seeking relief under the said commission, but so as not to disturb any dividend or dividends then already made."

As to the mode of conducting the sale and determining the sum to which the mortgagee is entitled, see Arch. Bank. Law, 121, 6th edit.

A sale cannot be effected under the order if there be a subsequent incumbrancer, who declines to join, except by selling subject to the incumbrance. (*Ex parte Jackson*, 5 Ves. 357; *Ex parte Topham*, 1 Madd. 38). And if the party on whose application the sale is made be not a first mortgagee, the estate may either be sold subject to the first mortgage, or the first mortgage may be paid off out of the purchase-money. (*Ex parte Havell*, 7 Vin. Abr. 102). The court of bankruptcy has jurisdiction to order a sale of an estate on a petition by a legal mortgagee; (*Ex*

(then consisting of two pieces) and hereditaments hereinafter particularly described, and intended to be hereby

BANKRUPT'S FREEHOLD ESTATE.

parte Bacon, 2 Dea. & Chit. 181); and even though the mortgagee have a power of sale; (*Ex parte Hodgson*, 1 Glyn & Jam. 12); but as a general rule in such cases, it seems the court will not interfere, as the estate may be sold by the commissioners under the order. (*Ex parte Moore*, 2 Dea. & Ch. 7). What is called a legal mortgagee of an equitable estate, that is, a person having a formal mortgage of an equity of redemption, or other equitable interest, is within the order. (*Ex parte Robinson*, 2 Dea. & Chit. 110; *Ex parte Aple*, 1 Mon. & Ayr. 621; *Ex parte Attwood*, 2 Mon. & Ayr. 24). Equitable mortgagees are not within the order; but, upon application to the court, they may obtain an order that the commissioners shall ascertain what is due to them in respect of their mortgages, that the property be sold, the produce disposed of as under Lord *Loughborough's* order, and the mortgagee prove for any balance that may be found due to him. (Arch. Bank. Law, 121, 122, and cases there cited; see, too, *Ex parte Ladbroke*, 1 Mon. & Ayr. 384; *Ex parte Nunn*, 1 Dea. 393; *Ex parte Attwood*, 2 Mon. & Ayr. 24; *Ex parte Berkeley*, 4 Dea. & Ch. 572; *Ex parte Bignold*, 1 Dea. 515; and supra, p. 158. See, however, *Ex parte Jones*, 3 Mont. & Ayr. 328). When some deposits are made with agreements in writing, and some without, the costs will be apportioned. (*Ex parte Thorpe*, 3 Dea. 85. See supra, p. 158). A valid equitable mortgage is not affected by a subsequent invalid legal mortgage. (*Ex parte Harvey*, 3 Dea. 547). Of course the equitable mortgagee and the assignees, if they agree, may sell without an order. (*Ex parte Whitbread*, 3 Dea. 311).

A mortgagee may obtain leave to bid at the sale; (Arch. B. L. 123); but if he have a power of sale, and wish to bid, he must waive his power, and allow the sale to take place under the order. (*Ex parte Davis*, 1 Mon. & Ayr. 89; 3 Dea. & Chit. 504). And if a mortgagee has purchased without leave, the purchase, if bonâ fide, will be confirmed. (*Ex parte Ashley*, 1 Mon. & Ayr. 82; S. C. 3 Dea. & Chit. 510; *Ex parte Pedder*, 1 Mon. & Ayr. 327; 3 Dea. & Ch. 622). A mortgagee who bids must pay a deposit. (*Ex parte Wilson*, 3 Dea. 545). The mortgagee, if he can so arrange with the assignees, and can satisfy the court of the propriety of the act, may accept the property in lieu of his claims as mortgagee. (*Ex parte Wright*, 1 Dea. & Ch. 573). When, on the application of a legal mortgagee, a sale takes place under the general order, the assignees are entitled to the rents and profits until the sale, unless the mortgagee have actually entered or given the tenant notice to pay him the rents, or entered into a special arrangement with the assignees; (*Ex parte Barnes*, 3 Dea. 233); but an equitable mortgagee, having obtained a special order for sale, is entitled to the rents and profits from the date of the order. (*Ex parte Bignold*, 2 Dea. & Chit. 398;

BANKRUPT'S FREEHOLD ESTATE.

released, were (together with other hereditaments) conveyed and assured [*to common uses, to bar dower in favour of* Q. R., *see ante, p.* 210]: AND WHEREAS [*recites mortgage of the 22nd of June,* 1831, *by appointment and release by* Q. R. *to* E. F. *and* G. H., *for securing* £12,000 *and interest, see ante, p.* 256]: AND WHEREAS, by an indenture bearing date the 22nd day of June, 1836, and made or expressed to be made between the said Q. R. of the one part, and the said E. F. and G. H. of the other part, in consideration of the further sum of £9,000 paid by the said E. F. and G. H. to the said Q. R., the said Q. R. did covenant with the said E. F. and G. H., their executors, administrators, and assigns, that the said hereditaments comprised in the said indenture of the 22nd day of June, 1831, should thenceforth be charged and chargeable as well with the payment of the said sum of

—of mortgage;

—of further charge.

Ex parte Living, 1 Dea. 1; 2 Mon. & Ayr. 223; *Ex parte Thorp*, 3 Dea. 85). An equitable mortgagee cannot entitle himself to the rents and profits by giving notice. (*Ex parte Burrell*, 3 Dea. 76; *Ex parte Scott*, 3 Dea. 304; see, too, *Garry* v. *Sharratt*, 10 B. & C. 717; *Sumpter* v. *Cooper*, 2 B. & Ad. 223).

If there be distinct mortgages for distinct debts to the same mortgagee, and a sale be made under the general order, the proceeds of each security can be applied only in liquidation of the debt for which it was mortgaged; so that the surplus of the proceeds of one security cannot be applied to make up a deficiency in the proceeds of another. (*Ex parte Bignold*, 3 Mon. & Ayr. 9).

When a bankrupt's estate is sold before the commissioners, neither the Court of Review, nor the Chancellor sitting in bankruptcy, has any jurisdiction to compel the purchaser to complete his purchase. (*Ex parte Cuth*, 3 Dea. 242, overruling *Ex parte Brettell*, Id. 111, and *Ex parte Gould*, 1 Glyn. & Jam. 231; *Ex parte Sidebotham*, 2 Mon. & Ayr. 146; S. C. 4 Dea. & Chit. 493; *Ex parte Barrington*, 4 Dea. & Chit. 461). And of course if the sale is made by the assignees of their own authority the purchaser is in nowise amenable to the jurisdiction of the court. (*Ex parte Holder*, 1 Mon. & Ayr. 518. See, too, supra, p. 412).

If a purchaser of a bankrupt's estate re-sell at a profit before the conveyance to him by the assignees, the court will direct the assignees to convey to the new purchaser, unless they raise some objections to the transaction. (*Ex parte Anderdon*, 1 Dea. 585. See, however, *Rigby* v. *M'Namara*, 6 Ves. 515; *Vale* v. *Davenport*, 6 Ves. 615; *Hodder* v. *Ruffin*, 1 Taml. 341; and supra, p. 92, note (*a*).

£12,000 and interest, as of the said sum of £9,000 and interest; AND WHEREAS the said G. H. duly made, signed, and published his last will and testament in writing, bearing date the —— day of ——, and thereby appointed the said A. B. and C. D. executors thereof; AND WHEREAS the said G. H. died in the month of ——, 1837, without having revoked or altered his said will, and the same was proved by the said A. B. and C. D. on the —— day of ——, 1837, in the Prerogative Court of the Archbishop of Canterbury; AND WHEREAS, before the date and execution of the indenture next hereinafter recited, parts of the hereditaments comprised in the said indentures of the 22nd day of June, 1831, and the 22nd day of June, 1836, (but not including the piece or parcel of land hereinafter particularly described, and intended to be hereby released), were sold, and the monies arising from the said sale were applied in part payment of the said sums of £12,000 and £9,000 so advanced by the said E. F. and G. H. as aforesaid, and the interest thereon; AND WHEREAS, after such payment, the principal sum of £18,000 only remained due and owing upon the securities aforesaid; AND WHEREAS [*recites mortgage by appointment and release of the 17th day of January, 1838, by* Q. R. *to* J. K., *for securing* £7,000 *and interest;*] AND WHEREAS a fiat in bankruptcy under the hand of the Lord High Chancellor of Great Britain was on the 17th day of February, 1838, awarded and issued against the said Q. R., and the said Q. R. was thereupon found and declared bankrupt, and the said L. M. and N. P. were chosen assignees of his estate and effects; AND WHEREAS the said S. T. is official assignee under the said fiat; AND WHEREAS the said Q. R. died in the month of May last; AND WHEREAS, by order of the said L. M. and N. P. (*b*), and with the consent of the said E. F. and J. K., the said piece or parcel of land and hereditaments hereinafter particularly described, and intended to be hereby released, were together with other hereditaments (part of the estate of the said Q. R.) advertised to be sold and put up for

BANKRUPT'S FREEHOLD ESTATE.

—of will of one of the mortgagees.

—of his death.

—and probate of his will.

—of part of the property having been sold, and the mortgage debt reduced,

—to the sum stated.

—of second mortgage.

—of the fiat against the bankrupt, and the choice of assignees.

—of the official assignee.

—of death of bankrupt.

—of the sale by auction.

(*b*) See next precedent, note (*b*).

BANKRUPT'S FREEHOLD ESTATE.

sale by auction, on the 12th day of July last, in several lots, by a particular of sale, lot 1 of the same particular comprising the said piece or parcel of land and hereditaments hereinafter particularly described, and intended to be hereby released; AND WHEREAS, at the said sale, the said U. V. was the highest bidder for, and was declared the purchaser of the said piece or parcel of land and hereditaments comprised in the said lot 1, at or for the price or sum of £700, and immediately after the said sale the said U. V. paid the sum of £105 to or on account of the said S. T., by way of deposit, and in part of the said sum of £700; AND WHEREAS the said sums of £12,000 and £9,000 were advanced by the said E. F. and G. H. out of monies belonging to them on a joint account(c); AND WHEREAS the said principal sum of £18,000, with an arrear of interest thereon, remains due and owing to the said E. F., on the security of the said indentures of the 22nd day of June, 1831, and the 22nd day of June, 1836, respectively, and the said principal sum of £7,000, with an arrear of interest thereon, remains due and owing to the said J. K., on the security of the said indenture of the 17th day of January, 1838; AND WHEREAS it has been agreed that the said purchase-money or sum of £700 shall be paid towards satisfaction and discharge of the said sum of £18,000 and interest; AND WHEREAS the said J. K. hath agreed to join in these presents, in manner hereinafter mentioned, in order to exonerate and discharge the said piece or parcel of land and hereditaments hereinafter particularly described, and intended to be hereby released from the said sum of £7,000 and interest. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and for effectuating the said sale, and in consideration of the said deposit or sum of £105, at or immediately before the sealing and delivery of these presents, paid to the said E. F. by the said S. T., with the privity and consent as well of the said L. M. and N. P. as of the said J. K., A. B., and C. D., (testified by their severally being parties to and

—of the purchase and payment of deposit to official assignee.

—of mortgage monies having been advanced by mortgagees out of joint fund.

—of mortgage money remaining due.

—that purchase-money is to be paid to first mortgagee.

—that second mortgage has agreed to join in conveyance.

Witnesseth.

Consideration.

(c) With respect to the object and meaning of this recital see infra, Precedent LIV. n. (a).

executing these presents), and of the sum of £595 at the same time paid to the said E. F. by the said U. V., with the privity and consent as well of the said L. M., N. P., J. K., A. B., and C. D., as of the said S. T., (testified by their severally being parties to and executing these presents) (*d*), (the receipt of which said several sums of £105 and £595, making together the said purchase-money or sum of £700, he the said E. F. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said U. V., his heirs, executors, administrators, and assigns, and also the said L. M., N. P., and S. T., and every of them, their and every of their heirs, executors, administrators, and assigns, and the estate and effects of the said Q. R., for ever, by these presents, and the payment of which said sum of £700 in manner aforesaid, for the purchase of the said piece or parcel of land and hereditaments hereinafter particularly mentioned, and intended to be hereby released, the said L. M., N. P., and S. T. do hereby acknowledge, and of and from the same and every part thereof do, and each of them doth, acquit, release, and discharge the said U. V., his heirs, executors, administrators, and assigns, for ever, by these presents), he the said E. F., at the request and by the direction of the said L. M., N. P., and S. T., and with the privity and consent of the said A. B., C. D., and J. K., (testified as aforesaid), hath released, and by these presents doth release, and the said J. K., at the request and by the direction of the said L. M., N. P., and S. T., (testified as aforesaid), hath released, and by these presents doth release, and the said L. M., N. P., and S. T. have, and each of them hath released, and by these presents do, and each of them doth release unto the said U. V. (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said E. F., J. K., L. M., N. P., and S. T., in consideration of 5*s.* apiece, &c., *supra*, *p.* 198), and to

BANKRUPT'S FREEHOLD ESTATE.

Receipt.

(*d*) In the precedent in the text the purchase-money is paid to the mortgagees. An example will be found in the next precedent of the payment being made to the official assignee. See supra, p. 413, n.

BANKRUPT'S FREEHOLD ESTATE.

his heirs, ALL THAT, &c. [*parcels—general words*], To HAVE AND TO HOLD the said piece or parcel of land and hereditaments, and all and singular other the premises hereinbefore released, or expressed and intended so to be, unto the said U. V. and his heirs, To THE USE of the said U. V., his heirs and assigns for ever, freed and absolutely discharged of and from the said mortgage sums of £18,000 and £7,000, and each of them, and all interest now due or hereafter to grow due from the same respectively; AND EACH of them the said E. F., J. K., L. M., N. P., and S. T., so far as relates to his own acts and deeds, doth hereby for himself, his heirs, executors, and administrators, covenant with the said U. V., his heirs and assigns, by these presents, that they the said E. F., J. K., L. M., N. P., and S. T. respectively have not &c. [*covenant against incumbrances; supra, p.* 241.] IN WITNESS &c.

Habendum to purchaser in fee.

Covenants.

XLV.

BANKRUPT'S LEASEHOLD.

ASSIGNMENT *of* LEASEHOLDS *by the* ASSIGNEES *and* OFFICIAL ASSIGNEE *of a* BANKRUPT (*a*).

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., C. D. of &c., and E. F. of &c., [*assignees of the*

Leasehold estates of bankrupt.

(*a*) The leasehold estates of bankrupts vest in the assignees by virtue of their appointment (supra, pp. 410, 411, n.); but the assignees are at liberty to decline any lease, or agreement for a lease, (see the cases cited infra), as it is obvious that the burden of the rent and covenants of a lease might be very prejudicial to the creditors. Before the stat. 6 Geo. 4, c. 16, a bankrupt lessee remained liable at all times, and even after obtaining his certificate, in an action for breach of covenant. (*Auriol* v. *Mills*, 1 H. Blackst. 433; S. C. 4 T. R. 94). But by section 75 of that statute a bankrupt having a lease, or a covenant for a lease, is exonerated from liability if the assignees accept the lease or agreement, or

estate and effects of G. H., *under a fiat in bankruptcy*], of the first part; I. K., of &c., [*official assignee under the*

BANKRUPT'S LEASEHOLD.

if they decline it, and he deliver it up to the lessor within fourteen days after he shall have had notice that the assignees declined it; and if the assignees shall not, upon being thereto required, elect whether they will accept or decline such lease or agreement, the lessor, or any person entitled under him, may apply by petition to the Court of Bankruptcy, which may order them to elect, and act according to their election. And the protection of this section is extended to a lessee by parol contract; (*Slack* v. *Sharp*, 3 Nev. & Per. 390); and to a person who has covenanted with the bankrupt that he will procure a lease to be granted to him by a third person of certain premises. (*Ex parte Benecke*, 1 Dea. 186). And as to the mode of proceeding if the assignee do not elect, see *Ex parte Fletcher*, (1 Dea. & Chit. 356); *Ex parte Blandy*, (1 Dea. 286). But the statute operates only as a personal discharge of the bankrupt, and therefore the bankruptcy of the assignee of a lease does not discharge the lessee from his personal covenant. (*Manning* v. *Flight*, 3 B. & Ad. 211). Nor does the discharge of the lessee operate as a discharge of a surety. (*Tuck* v. *Fyson*, 6 Bing. 321; S. C. 3 Moo. & Pay. 715; *Inglis* v. *Macdougal*, 1 J. B. Moore, 196).

What is an election by the assignees to accept a lease.

What amounts to an election by the assignees to accept the lease is a question which has given rise to considerable litigation. If the assignees take possession of the premises, or deal with them as the owners, or absolutely sell the lease, they will be deemed to have accepted the lease. (*Thomas* v. *Pemberton*, 7 Taunt. 206; *Hanson* v. *Stevenson*, 1 B. & Ald. 303; *Hastings* v. *Wilson*, Holt's Reports, 290; *Ansell* v. *Robson*, 2 C. & J. 610). But the assignees will not be deemed to have elected to accept a lease by having put it up to auction to ascertain its value; (*Turner* v. *Richardson*, 7 East, 335); or by having retained the key of the premises, or paid rent to avoid a distress on the goods of the bankrupt; (*Wheeler* v. *Bramah*, 3 Camp. 340); or by having released an under-tenant. (*Hill* v. *Dobie*, 8 Taunt. 325; S. C. 2 J. B. Moore, 342). If the assignees decline the lease, the term is considered as having determined, and the rights of all parties under the covenants are governed by that consideration. (*Ex parte Maundrell*, 2 Madd. 315; S. C. Buck, 83; *Ex parte Nixon*, 1 Rose, 445; S. C. Buck, 85; *Ex parte Whittington*, Buck, 87). But it seems that a covenant by a lessor to take the fixtures at a valuation cannot be enforced by assignees declining the lease. (*Kearsey* v. *Carstairs*, 2 B. & Ad. 716). And assignees declining a lease cannot avail themselves of an agreement by the lessor to allow the lessee to deduct from the rent money which he had laid out on the premises. (*Ex parte Ladd*, 3 Dea. & Chit. 647).

If the assignees accept the lease, and find it burdensome, they may assign it to any person, and even to an insolvent person, for the purpose

BANKRUPT'S LEASEHOLD.

same fiat], of the second part; G. H., of &c., [*bankrupt*], of the third part; and L. M., of &c., [*purchaser*], of the fourth part, [*recites lease to G. H.; supra, p. 333*]: AND WHEREAS a fiat in bankruptcy, under the hand of the Lord High Chancellor of Great Britain, was, on the —— day of ——, awarded and issued against the said G. H., and the said G. H. was thereupon found and declared bankrupt, and the said A. B., C. D., and E. F., were chosen assignees of his estate and effects: AND WHEREAS the said I. K. is official assignee under the said fiat: AND WHEREAS, by order of the said A. B., C. D., and E. F. (*b*), the said piece or parcel of land, messuages, and premises were, on the —— day of ——, put up to sale by public auction, and at the said sale the said L. M. was the highest bidder for, and was declared the purchaser of the said premises, at the price or sum of £——: AND WHEREAS the said G. H. hath agreed to join in these presents in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said sale, and in consideration of the sum of £——, at or immediately before the sealing and delivery of these presents to the said I. K. paid by the said L. M., (the receipt and payment of which said sum of £——, the said I. K., and also the said A. B., C. D., and E. F., and the said G. H.

Recites the lease and its having vested in bankrupt.

—fiat against bankrupt, and choice of assignees.

—of official assignee.

—of sale.

—of bankrupt having agreed to join in assignment.

Witnesseth.

Consideration.

Receipt.

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of relieving themselves from future responsibility; (*Onslow* v. *Corrie*, 2 Madd. 330; see, too, *Fagg* v. *Dobie*, 3 You. & Col. 96. But not if the landlord himself be the assignee. (*Ex parte Wright*, 2 Rose, 244; see, too, *Ex parte Warwick*, Buck, 326).

It will be seen that the bankrupt is made to join in the assignment and covenant for title, but he cannot be compelled to do so. See supra, page 413, n.

(*b*) The sale is sometimes recited to have been made by the order as well of the creditors' assignees as of the official assignee, but this recital seems improper, as the 23rd section of the statute 1 & 2 Will. 4, c. 56, expressly declares that the official assignee is not to interfere with the creditors' assignees in directing the time and manner of effecting any sale of the bankrupt's estates or effects. (See, too, Arch. Bank. Law, Section xviii).

do hereby respectively acknowledge, and of and from the same and every part thereof do, and each of them doth acquit, release, and discharge the said L. M., his heirs, executors, administrators, and assigns for ever, by these presents), they the said A. B., C. D., and E. F., and also the said I. K., have and each of them hath assigned, and by these presents do, and each of them doth assign, and the said G. H., at the request and by the direction of the said A. B., C. D., E. F., and I. K., (testified by their severally being parties to and executing these presents), hath assigned and confirmed, and by these presents doth assign and confirm unto the said L. M., his executors, administrators and assigns, THE SAID piece or parcel of ground, messuage, or building, and all and singular other the premises, by the said indenture of the —— day of ——, demised, or expressed and intended so to be, with their rights, easements, and appurtenances, AND ALL the estate &c.: TO HAVE AND TO HOLD the said piece or parcel of ground, messuage, or building, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said L. M., his executors, administrators, and assigns, for all the residue now to come of the said term of —— years, at the rent and under and subject to the covenants, conditions, and agreements, by and in the said indenture of the —— day of —— reserved and contained, and on the part of the lessee, his executors, administrators, or assigns, to be henceforth paid, observed, and performed [*Covenants severally by the assignees and official assignee with the purchaser against incumbrances; supra, p.* 241 :—*covenants by bankrupt—for the validity of the lease—for right to assign—for quiet enjoyment—free from incumbrances—and for further assurance; supra, pp.* 233 & 336 (*c*)]. IN WITNESS &c.

BANKRUPT'S LEASEHOLD.

Assignment.

Parcels.

Habendum.

Covenants.

(c) It will be observed, that the purchaser does not in the present instance enter into the usual covenants to indemnify the vendor against the rent and covenants. For the assignees are not themselves liable in respect of the rent and covenants after they have assigned the lease, and

XLVI.

UNDIVIDED SHARE OF A MARRIED WOMAN.

CONVEYANCE *of the* UNDIVIDED SHARE *of a* MARRIED WOMAN *in Freehold Estate,* EQUITABLE RELEASE *of an* ANNUITY.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., and C. B., his wife, [*vendors*], of the one part; D. E., of &c., [*annuitant*], of the second part; F. G., of &c., [*purchaser*], of the third part; and H. I., of &c., [*trustee*], of the fourth part: WHEREAS T. R., late of &c., being seised or entitled for an estate of inheritance in fee-simple in possession of or to the messuage, farm, lands, and other hereditaments hereinafter particularly mentioned, and an undivided share of which is intended to be hereby released and disposed of, duly made, signed, and published his last

Recital of will creating tenancy in common in fee, amongst daughters of M. N. and S. N., subject to life, and other prior estates,

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are therefore not entitled to call upon the assignee to enter into covenants for their indemnity. (*Wilkins* v. *Fry*, 1 Mer. 244). The bankrupt is expressly released from liability if the assignees accept the lease. (See stat. 6 Geo. 4, c. 16, s. 75, supra, n. (*a*)). Of course the value of the lease is considerably enhanced by the purchaser being exempted from the necessity of entering into covenants to pay the rent and observe the covenants, because he can at any time determine his liability by assigning the lease; whereas, in ordinary cases, by an assignment he only relieves himself from direct responsibility to the lessor, and remains liable to the assignor, whom he has covenanted to indemnify. (See supra, p. 86, n. (*h*), and p. 338, n. (*h*)).

The case is, however, altered if the bankrupt be not the lessee, but an assignee, and have entered into covenants to indemnify the lessee, for the statute does not extend to discharge the bankrupt from the obligation of such covenants. It is, however, clear that he cannot, even under these circumstances, require an indemnity; (*Wilkins* v. *Fry*, ubi supra); but he will, in all probability, make it the condition of his joining in the assignment, that he shall obtain covenants by the purchaser for indemnifying him against the liabilities of his own covenants.

UNDIVIDED SHARE OF A MARRIED WOMAN.

will and testament in writing, bearing date the —— day of ——, and thereby, after directing his debts and funeral and testamentary expenses to be paid by his executors, gave and bequeathed unto his son, the said D. E., the sum of 10*s.* a week during his life, to be paid and payable out of the —— estate, (meaning thereby the said hereditaments hereinafter particularly mentioned, and an undivided share of which is intended to be hereby released and disposed of); and the said testator, by his said will, devised the same estate, subject to the payment of the said weekly sum, To THE USE of M. N. and his assigns, for his life, with remainder To THE USE of X. Y. and Y. Z. and their heirs, during the life of the said M. N., in trust for him and his assigns, and to preserve contingent remainders, with remainder To THE USE of the testator's daughter, S. N., the wife of the said M. N., and her assigns, for her life, with remainder [*to trustees, ut supra*], with remainder To THE USE of the first and other sons of the said M. N. by the said S. N., successively in tail, with remainder To THE USE of all and every the daughters of the said M. N. by the said S. N., as tenants in common in fee, with limitations in the nature of cross remainders in case of the death of any of them under the age of twenty-one years, without issue, amongst the survivors or others of them, as tenants in common in fee; AND WHEREAS the said T. R. died in the month of ——, without having revoked or altered his said will; AND WHEREAS there was issue of the said M. N. by the said S. N. six children and no more, namely, the said C. B. and five other daughters; AND WHEREAS the said P. B., one of the five other daughters, died in the year ——, under the age of twenty-one years, and without having been married; AND WHEREAS the said S. N., died in the month of ——, and the said M. N. in the month of ——; AND WHEREAS the said A. B. and C. D. have contracted and agreed with the said F. G. for the absolute sale to him of the said undivided share, intended to be hereby released and disposed of, of the said hereditaments hereinafter particularly mentioned, and the inheritance of the said share in fee-simple in possession, free from incumbrances, at or

—and to an annuity;

—of death of testator;

—of six daughters, being the only issue of M. N. and S. N.

—of death of one daughter;

—of death of M. N. and S. N.

—of contract for sale.

UNDIVIDED SHARE OF A MARRIED WOMAN.

for the price or sum of £——; AND WHEREAS the said D. E. has agreed, at the request of the said A. B. and C. D., to join in these presents, in manner and for the purpose hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the sum of £——, to the said A. B. and C. B. paid by the said F. G. at or immediately before the sealing and delivery of these presents, (the receipt of which said sum of £—— they the said A. B. and C. B. do hereby acknowledge, and of and from the same and every part thereof do, and each of them doth, acquit, release, and discharge the said F. G., his heirs, executors, administrators, and assigns, for ever, by these presents), she the said C. B., with the concurrence of the said A.B., (testified by his being a party to and executing these presents), doth by this present deed, grant, alien, release, and dispose of, and he the said A. B. hath granted, aliened, released, and confirmed, and by these presents doth &c., unto the said F. G., (in his actual possession now being by virtue of a bargain and sale thereof to him made by the said A. B. and C. B. (*a*), in consideration of 5*s.* a piece, &c., *ut supra*,

—of annuitant having agreed to join.

Witnesseth.

Consideration.

Receipt.

Conveyance.

As to the wife's joining in the lease for a year.

(*a*) The husband alone can make a lease of the wife's land, which will be valid at least during the coverture, (see 4 Cru. Dig. 62), and therefore it is by no means essential to make the wife a party to the bargain and sale for a year. Even if the coverture should determine before the expiration of the year the conveyance would not be invalidated, because it is sufficient if at the time of the conveyance there be an estate of some sort subsisting, so as to create a reversion in the grantor. See supra, p. 198, n. (*l*).

In practice, however, when the estate is the wife's, she should join in making the lease for a year, and should acknowledge that deed as well as the release; for otherwise, in every subsequent investigation of title it will be necessary to furnish evidence of a legal marriage having taken place.

As to the mode of acknowledgment, see ante, p. 198, n. (*k*), and the authorities there cited. As to acknowledgment before a notary public abroad, see *Ex parte Mann*, 5 Bing. N. C. 226.

By the 91st section of the act 3 & 4 Will. 4, c. 74, the Court of Common Pleas is authorized, in certain cases, to dispense with the husband's concurrence. (See *Ex parte Gill*, 1 Bing. N. C. 168, and *corrigenda*; *Ex parte Shirley*, 5 Bing. N. C. 226).

p. 198), and his heirs, ALL THAT the one undivided fifth part or share (the whole into five equal parts being considered as divided), to which the said C. B. is entitled as hereinbefore is mentioned, of and in ALL THAT &c. [*parcels*], and of and in [*general words*], TO HAVE AND TO HOLD the said undivided fifth part or share hereinbefore released and disposed of, or expressed and intended so to be, of the said hereditaments hereinbefore particularly mentioned, and all and singular other the premises hereinbefore released and disposed of, or expressed and intended so to be, unto the said F. G., TO SUCH USES &c. [*common uses to bar dower, with the usual declaration, supra, p.* 214]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said F. G. and his heirs, by these presents, in manner following, (that is to say), that, for and notwithstanding any act, deed, matter, or thing whatsoever, by them the said A. B. and C. B., or either of them, or the said T. R., made, done, committed, or executed, or knowingly or willingly suffered to the contrary, she the said C. B., or the said A. B., in her right, at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said part or share and premises hereinbefore granted and released, or expressed and intended so to be, and every part thereof, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee-simple, without any manner of condition, use, trust, property, power of revocation, equity of redemption, or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, defeat, incumber, revoke, or make void the same; AND THAT, for and notwithstanding any act, deed, matter, or thing whatsoever as aforesaid, they the said A. B. and C. B. now have in themselves respectively good right, full power, and lawful and absolute authority to grant, release, dispose of, and confirm the said part or share and premises hereinbefore granted, released, disposed of, and confirmed, or expressed and intended so to be, to the uses and in manner aforesaid, according to the true intent and meaning of these presents, AND THAT the said part or share and premises

UNDIVIDED SHARE OF A MARRIED WOMAN.

Parcels.

Habendum.

To uses.

Covenants by the husband of the vendor,

—for title;

—for right to convey;

UNDIVIDED SHARE OF A MARRIED WOMAN.

hereinbefore released, or expressed and intended so to be, shall and may, from time to time and at all times hereafter, go and remain to the uses, upon the trusts, and with, under, and subject to the power hereinbefore limited and declared of and concerning the same, and be peaceably and quietly entered into and upon, and be held, occupied, possessed, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by them the said A. B. and C. B., or either of them, or the heirs of the said C. B., or of or by any other person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them or any of them, or by, from, or under the said T. R.; AND THAT, free and clear, and freely and clearly and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered, by the said A. B. and C. B., or either of them, or the heirs or assigns of the said C. B., or any person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for them or any of them, or by, from, or under the said T. R.; AND FURTHER, THAT they the said A. B. and C. B., and the heirs of the said C. B., and all and every other person and persons whomsoever, having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said part or share and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for the said A. B. and C. B., or either of them, or the heirs of the said C. B., or by, from, or under the said T. R., shall and will, from time to time and

—free from incumbrances;

—for further assurance.

UNDIVIDED SHARE OF A MARRIED WOMAN.

at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said F. G., his appointees, heirs, or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, disposing, conveying, and assuring of the said part or share and premises hereinbefore released, or expressed and intended so to be, and every part thereof, To the uses and in manner aforesaid, as by the said C. D., his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement in this behalf, and for the considerations aforesaid, he the said D. E., at the request of the said A. B. and C. B., (testified by their being parties to and executing these presents), doth hereby for himself, his heirs, executors, and administrators, covenant with the said F. G. and his heirs, that he the said D. E. or his assigns, or any person or persons claiming by, from, or under him, shall not nor will at any time hereafter resort to the said part or share and other the premises hereinbefore released, or expressed and intended so to be, for payment of the said weekly sum of 10*s.*, or any part thereof, and shall and will, at the request, costs, and charges of the said F. G., his appointees, heirs, and assigns, at any time hereafter, make, do, and execute all such acts, deeds, and things, for better and more perfectly protecting the said undivided share and premises from all claims and demands in respect of the said weekly sum of 10*s.* and all arrears (if any) and future payments thereof as by the said F. G., his appointees, heirs, or assigns, or his or their counsel, shall be reasonably advised or devised and required (*b*). IN WITNESS &c.

Witnesseth, secondly, covenant by the annuitant not to resort for his annuity to the share purchased.

(*b*) If the person entitled to a rent charge release part of the land out of which it is payable, the whole rent charge is thereby extinguished.

Release of part of the land

XLVII.

ENFRANCHISEMENT UNDER POWER.

ENFRANCHISEMENT *of* COPYHOLDS *under a* POWER *in a* SETTLEMENT.

Parties.

THIS INDENURE made &c. BETWEEN A. B. of &c., and C. D. of &c. [*the donees of the power*], of the first part; E. F. of &c. [*tenant for life under the settlement*], of the second part; and G. H. of &c. [*copyholder*], of the third part: WHEREAS, by indentures of lease and appointment and release, bearing date respectively the —— and —— days of ——, the appointment and release being made or expressed to be made between [*parties*], (being the settlement made previously to, and in consideration of the marriage then intended, and shortly after had and solemnized between the said —— and ——), the manor or lordship of ——, in the county of ——, with its rights, members, and appurtenances, (together with other manors, lands, and hereditaments), was conveyed and assured, and limited, from and after the solemnization of the said marriage (subject to a yearly rent-charge of £——, thereby limited to ——, and his assigns, during the joint lives of himself and the said M. N., and to the powers and remedies thereby

Recital of settlement;

charged with a rent charge.

(Co. Lit. 148. a.; Burton's Law of Real Property, 372; 3 Cru. Dig. 301). And hence, when the person entitled to a rent charge is desirous of releasing part of the land out of which it is payable, the usual mode is for him to enter into such a covenant as that in the text, which effectually precludes him from subsequently claiming his rent charge out of the land released, and is in fact an equitable release. (*Butler* v. *Monnings*, Noy, 5; *Deux* v. *Jefferies*, Cro. Eliz. 352, Ambl. 250). It is said that such a covenant amounts to a legal release of the lands; (Cru. Dig. tit. xxviii. ch. iii. s. 21; Co. Lit. 148. a., note (*)); and if there be any consideration due to this opinion, it may be proper to frame the covenant as a covenant to indemnify against the rent charge and expenses. See another precedent of an equitable release of a rent charge in a subsequent volume of this work.

ENFRANCHISEMENT UNDER POWER.

limited or created for enforcing the payment of the said rent charge when in arrear, and to a term of —— years, thereby limited to the said ——, their executors, administrators, and assigns, upon the trusts therein mentioned, for further securing the payment of the said rent charge), to the use of the said M. N. and his assigns for his life, without impeachment of waste, with remainder to the said A. B. and C. D., and their heirs, during the life of the said M. N., in trust for him and his assigns, and to preserve the contingent remainders, with remainder to the use of the said E. F. and his assigns for his life, without impeachment of waste, with remainder to the use of the said A. B. and C. D., and their heirs, during the life of the said E. F., in trust for him and his assigns, and to preserve the contingent remainders, with divers remainders, over: And in the said indenture of appointment and release, (amongst other powers and provisoes), was contained a power or proviso that it should be lawful for the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, at any time or times thereafter, at the request and by the direction of the said M. N. and E. F., during their joint lives, and, after the decease of such of them as should first die, at the request and by the direction of the survivor of them during his life, and after the decease of such survivor, then at the request of the persons therein mentioned or referred to, (such request and direction to be testified by some writing or writings under the hand and seal, or respective hands and seals of the person or persons whose request and direction was thereby made necessary), to enfranchise, and for that purpose to grant, bargain, sell, release, and confirm, all or any part of the messuages, lands, tenenements, or hereditaments holden by copy of court roll of the manors thereinbefore mentioned, or any of them, for such price or prices in money as should be thought reasonable; and it was by the same indenture provided [*that the receipts of the trustees should be good discharges—recited verbatim*]; and that when any of the premises should be enfranchised, and such proper receipts as aforesaid should be given for the

—and particularly of the power of enfranchisement.

ENFRANCHISEMENT UNDER POWER.

consideration money of such enfranchisement, the freehold of all and every the messuages, lands, tenements, and hereditaments so enfranchised should be and remain for ever from thenceforth freed and absolutely discharged of and from all and every the uses, estates, trusts, limitations, powers, provisoes, and agreements thereinbefore limited, declared, or expressed, and then and from thenceforth the said indenture now in recital, as to the same hereditaments so enfranchised, should be and enure to the only use and behoof of the person or persons to whom such enfranchisement or enfranchisements should be respectively made, and of his, her, and their heirs and assigns respectively for ever: AND WHEREAS the said M. N. died on or about ——: AND WHEREAS the said G. H. is seised or entitled for an estate of inheritance to him and his heirs, according to the custom of the said manor of ——, of or to the messuages, lands, and other hereditaments hereinafter particularly mentioned and intended to be hereby enfranchised: AND WHEREAS the said A. B. and C. D., at the request and by the direction of the said E. F., (testified by this writing under his hand and seal) (*a*), have contracted and agreed with the said G. H. for the enfran-

—of death of first tenant for life;

—of the seisin of the copyholder.

Form of testifying request.

(*a*) The form in which a request should be testified depends on the circumstances of each case: for, if a particular form of request be made necessary by the terms of a power or trust, that form must be observed. Thus, if the request, as in the text, is to be testified by writing under hand and seal, the expression should be, "testified by this writing under his hand and seal." And so the expression should be, "testified by this writing under his hand;" or, "by his being a party to and executing this present deed;" or such other phrase as the power or trust requires. If no form be required, the usual expression is, "testified by his being a party to and executing these presents." And it is usual to introduce this expression whenever it is intended to express a request, or direction, or consent, even if such be not required by a power or trust, although there can be no doubt that if it be stated that an act is done, or about to be done, at the request, by the direction, or with the consent of any person, and that person is a party to and executes the deed in which the statement is made, he will be as effectually precluded from denying his concurrence, as though the manner in which his concurrence was given were formally stated.

chisement to him of the said messuages, lands, and other hereditaments hereinafter particularly mentioned and intended to be hereby enfranchised, with their appurtenances, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £——, at or immediately before the sealing and delivery of these presents, paid by the said G. H. to the said A. B. and C. D., (the receipt, &c.; *supra, p.* 296), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority in and by the said indenture of the —— day of ——, to them the said A. B. and C. D. for this purpose given or limited as hereinbefore is mentioned, and of every or any other power or authority in anywise enabling them in this behalf, they the said A. B. and C. D., at the request and by the direction of the said E. F., (testified by this writing under his hand and seal), have and each of them hath enfranchised, and for that purpose granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth enfranchise, grant, bargain, sell, release, and confirm unto the said G. H., (in his actual possession now being, by virtue of a bargain and sale thereof to him made by the said A. B. and C. D., in consideration of five shillings a-piece, &c. *ut supra, p.* 198), and his heirs (*b*): ALL &c. [*parcels—general words—supra, p.* 277]: To

ENFRANCHISEMENT UNDER POWER.

Witnesseth.

Consideration.

Enfranchisement.

Parcels.

(*b*) With respect to the nature and effect of an enfranchisement, see supra, p. 276, n. (*b*), and the authorities there cited.

Enfranchisement.

The power of enfranchisement given in the text is extremely meagre, and the manner in which it should be exercised is not very intelligible; for the donees of the power are simply trustees to preserve contingent remainders; and it might well happen, that, when they came to exercise the power, their estate in the land might have determined. Why, then, should they convey by lease and release, or what estate passes by such a mode of conveyance, beyond the estate (if any) vested in the trustees for preserving the contingent remainders? The truth seems to be, that the power given "to enfranchise, and for that purpose to grant, bargain, sell, release, and confirm," is simply a power to enfranchise, and for that purpose to appoint the freehold of the enfranchised lands to new uses. The lease for a year is erroneous; and the words "grant,

Operation and nature of a power of enfranchisement.

ENFRANCHISEMENT UNDER POWER.

HAVE AND TO HOLD the said messuages, lands, and hereditaments, and all and singular other the premises

Habendum.

bargain, sell, release, and confirm," are to be taken merely as the words of appointment. In a recent case in practice the power of enfranchisement was blended with that of sale and exchange, the power being, to sell, exchange, or enfranchise, and for those purposes to revoke the old uses and appoint new. But for the enfranchisement the difficulty was, that the old uses were declared of the manor, and not of the lands, to be enfranchised, and the powers being to revoke the uses of the lands enfranchised, there was an inconsistency on the face of the instruments. It was, however, considered that the power by necessary intendment must enable the appropriate revocation to be made, and the operation was conducted as follows: By the first witnessing part of the enfranchisement deed the donees of the power "enfranchised" the copyholds; By a second witnessing part for effectuating the enfranchisement they revoked the old uses, declared "of the freehold of the lands enfranchised, and of the manors so far as they relate thereto;" and by a third witnessing part for further effectuating the enfranchisement, the donees appointed the lands to the purchaser freed of the copyhold tenure. And a course somewhat similar to this would seem to be the appropriate one in the case of an enfranchisement under an ordinary power. The only intelligible view of an enfranchisement under a power is to consider, that, by the settlement of the manor, the freehold of the copyhold lands is settled, and that the power to enfranchise is a power to revoke the uses of the settlement, and appoint new uses of the lands to be enfranchised.

Whether a power of sale authorizes an enfranchisement.

It has been suggested that the common power of sale and exchange of a manor authorizes the enfranchisement of the copyholds of the manor. But there is no authority (so far as the editor knows) for this proposition, and the principle of it is extremely doubtful. It might even be a question whether a power to sell the manor would authorize the sale separately from the manor of any demesne lands of the manor which had fallen into the lord's hands; but there appears to be a great dearth of authorities on points of this nature.

Enfranchisement of copyholds for lives.

In cases where the customary lands are copyholds for lives, the transaction must partake of the nature of a sale as well as of an enfranchisement; for admitting that with respect to the life interests it is an enfranchisement, still with regard to the reversions expectant on the lives it must be deemed a sale. Perhaps it may be doubted whether the ordinary power of enfranchisement authorizes an enfranchisement in fee-simple to a copyholder for lives; and supposing it does not, then the question arises, whether the enfranchisement being applied to the estate for lives, so as to convert them into a freehold lease for lives, the reversion expectant on that lease can be disposed of under the common power of sale. The difficulty cannot be got rid of by surrendering the life estate, because

hereinbefore enfranchised, and granted and released, or expressed and intended so to be, unto the said G. H., his heirs and assigns, to the use of the said G. H., his heirs and assigns for ever (*c*), freed and absolutely discharged of and from the copyhold tenure thereof, and of and from all rents, payments, heriots, suits, customs, and services incident thereto, or by custom, prescription, or otherwise howsoever, to be paid, rendered, or performed to the lord of the said manor of —— for the time being, for or in respect of the same premises or any of them (*d*): AND EACH of them the said A. B. and C. D., so far as relates to his own acts and deeds, doth hereby &c. [*covenant for right to exercise the power; supra, pp. 232 and 241. Covenants by E. F., as at p. 233, changing the word of reference* "appointed" *to* "enfranchised and granted and released"]. IN WITNESS &c.

ENFRANCHISEMENT UNDER POWER.

Covenants.

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it is still obvious that the sale is not made at the best price that might be had, as the copyholder, though he might technically surrender his lifehold estate, would undoubtedly take its value into consideration in the price he gave for the fee. If all the lives have dropped, it is clear that an enfranchisement cannot be made, because there is no copyholder to accept it; whether a sale is practicable depends on the question above stated, whether a power to sell a manor authorizes a sale of the demesne lands of the manor separately from the manor.

(*c*) When an enfranchisement is made under a power, the usual practice is to convey or limit the estate to the coppholder in fee-simple, and not to uses. But viewing the enfranchisement (see preceding note) as an appointment under a power, there can apparently be no objection to appointing the freehold to any uses which may be desired. It is presumed that the copyhold interest will be as effectually extinguished if only a partial estate in the freehold is limited to the copyholder, as though the whole fee had been limited to him. See supra, p. 276, n. (*b*), and the authorities there cited.

Mode of limiting the freehold.

(*d*) See supra, p. 277, n. (*c*).

No re-grant of rights of common is made in the present case, (supra, p. 277 & p. 278, n. (*d*)), because the power being simply to enfranchise, does not authorize a grant which is not necessarily incident to an enfranchisement. But as it seems that even if the right of common were not re-granted it would subsist in equity, (*Styant* v. *Staker*, 2 Vern. 250), it might perhaps

Re-grant of commons.

XLVIII.

TO A RAILWAY COMPANY.

CONVEYANCE *to a* RAILWAY COMPANY (*a*).

Parties.

THIS INDENTURE, made &c. BETWEEN A. B. of &c., C. D. of &c., and E. F. of &c., [*vendors*], of the one part, and the —— Railway Company established and incorporated by an Act of Parliament, made and passed in the —— year of the reign of his late Majesty King William the 4th, intituled "An act for making a railway from —— to ——, with a branch therefrom," of the other part: WHEREAS the said A. B., C. D., and E. F., are seised or entitled of or to the lands and other hereditaments hereinafter mentioned or referred to, and intended to be hereby conveyed in equal

Recital of a seisin in fee by the vendors as tenants in common.

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be maintained that the power to make the usual re-grant of common is necessarily incident to a power to enfranchise. All well drawn powers of enfranchisement expressly authorize the re-grant of commons.

Proviso restricting the effect of the enfranchisement.

It may perhaps be proper, in the case of an enfranchisement under a power, when the uses declared of the manor, so far as they relate to the lands intended to be enfranchised, are expressly revoked, to insert the proviso given ante, p. 278, n. (*e*); not that it is essential, but simply to make the intention more clear.

(*a*) All modern acts for railways, canals, and other undertakings, which require numerous purchases of real estate, contain forms of conveyance differing from those in ordinary use. These forms are not, however, made compulsory; but it is simply enacted, that conveyances for the purposes of the act may be made according to these forms, or as near thereto as circumstances will permit. The forms themselves are absurd, and are inapplicable except in the very simplest cases; but coupled with the permissive clause previously referred to they are very useful, because they enable the draftsman to simplify his conveyances by using the operative words rendered effective by the act. The best way is to make the conveyance by indenture, giving parties and recitals in the usual way, and to avail ourselves of the words of the statutory form in the operative part and habendum. With respect to the introduction of covenants, see the note infra.

shares as tenants in common for an estate of inheritance in fee-simple in possession, free from incumbrances: AND WHEREAS the said company, in pursuance of the powers reposed in them by the said act, have contracted for the purchase, for the purposes of the said act (*b*), of the said lands and other hereditaments, and the inheritance thereof in fee-simple in possession, free from incumbrances, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £——, paid by the said company to the said A. B., C. D., and E. F. (*c*), at or before the execution of these presents (the receipt of which said sum of £——, they, the said A. B., C. D., and E. F., do hereby acknowledge, and of and from the same and every part thereof do, and each of them doth, acquit, release, and discharge the said company, their successors and assigns for ever by these presents). They, the said A. B., C. D., and E. F., do hereby convey (*d*) to the said

TO A RAILWAY COMPANY.

—of contract for purchase.

Witnesseth,

Consideration.

Conveyance.

(*b*) When the company are purchasing from persons who have power to sell independent of the act, the recital may be either of a sale to, or of a purchase by, the company for the purposes of the act; supra, p. 193, n. (*c*). But when the company are purchasing from persons who have no capacity to contract, except by force of the act, the recital should be of a purchase by the company. If, on the other hand, a sale is made to the company, not by virtue of the powers of the act, but by virtue of a power or trust for sale reposed in the vendors, the recital should be of a sale. The distinction in the case of a settled, or trust estate, is of considerable importance; because, if the company purchase by virtue of the powers of the act, the purchase-money must be paid into the Bank of England in manner provided by the act; but if the sale be made to the company by virtue of an independent power or trust for sale, the purchase-money may be paid to the vendors, as in the case of an ordinary purchase.

(*c*) If the purchase be made from persons who have no capacity to contract, except by force of the act, the money must be stated to be paid into the Bank of England to the account, &c., according to the form which the acts require. If an acknowledgment be added in such case, of course it must be an acknowledgment of payment not of receipt.

(*d*) It has been before observed, that the operative words which the act renders effective must be used.

TO A RAILWAY COMPANY.

company, their successors and assigns, ALL THOSE pieces or parcels of land, situate in the parish of ——, in the county of ——; containing in the whole ——, now or late in the occupation of ——; the particular shape, boundaries, and position of which said pieces or parcels of land are delineated in the map or plan drawn in the margin of these presents, (and which said pieces of land intended to be hereby conveyed form parts of the pieces numbered —— and ——, in the map and book of reference of the said railway, deposited with the clerk of the peace for the said county of ——; Together with all ways, rights, easements, and appurtenances thereunto belonging, and all such estate, right, title, and interest in and to the same and every part thereof, as they, the said A. B., C. D., and E. F., respectively are or shall become seised or possessed of, or are, by the said act, capacitated or empowered to convey (*e*), TO HOLD the said premises to the said company, their successors and assigns, for ever, according to the true intent and meaning of the said act (*f*): AND EACH (*g*) of them, the said A. B., C. D., and E. F., so far as relates to his own acts and deeds, and the acts and deeds of his heirs, and of all persons claiming through or under him or them, and so far as relates to his own undivided third part of and in the said premises, doth hereby, for himself, his heirs, executors,

Parcels.

General words.

Habendum.

Covenants by the vendors.

(*e*) The mode of referring to the parcels depends in some degree on the language and provisions of the act, but the clauses relating to these matters are very nearly the same in all modern acts of the same kind. The form and expressions given as general words are those contained in the form prescribed by the act.

(*f*) The habendum is taken from the form in the act.

(*g*) The parliamentary forms are not indentures, and do not contemplate or admit of the introduction of covenants. Perhaps the company could not insist on having any covenants from the vendors when the land is taken by force of the act, or even in any case; (supra, p. 32, n. (*k*)); but, unless the vendors be trustees, or persons having no interest, it seems fair that they should covenant for their right to convey and for further assurance. In all the conveyances to the company which the precedent refers to, covenants were entered into by the vendors without objection.

and administrators, covenant with the said company, their successors and assigns, THAT, for and notwithstanding any act, deed, matter, or thing, by them, the said A. B., C. D., and E. F., respectively made, done, or executed to the contrary, they, the said A. B., C. D., and E. F., now have in themselves respectively good right to convey the said hereditaments and premises hereinbefore conveyed, or intended so to be, to the said company, their successors and assigns, in manner aforesaid, according to the true intent and meaning of these presents. AND FURTHER, THAT they, the said A. B., C. D., and E. F., and their heirs respectively, and all other persons claiming by, from, under, or in trust for them, respectively, will, from time to time, and at all times hereafter, at the costs and charges of the said company, their successors or assigns, make, do, and execute all such acts, deeds, and assurances, for further, better, and more effectually conveying and assuring the said hereditaments and premises, hereinbefore conveyed, or intended so to be, unto the said company, their successors and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said company, their successors and assigns, or their counsel in the law, shall be reasonably advised, or devised and required. IN WITNESS &c.

TO A RAILWAY COMPANY.

—for right to convey.

—and for further assurance.

XLIX.

TO CHURCHWARDENS AND OVERSEERS.

CONVEYANCE *to the* CHURCHWARDENS *and* OVERSEERS *of the Poor of a Parish under the* ACT *of the* 59 Geo. 3, c. 12, (*a*), *with a Proviso against* PRODUCING *the* TITLE DEEDS *to the Purchasers, and a* COVENANT *by them to put up and maintain a* FENCE.

Parties.

THIS INDENTURE, made &c., BETWEEN A. B., of &c. [*vendor*], of the one part; and C. D. and E. F., the

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Conveyances for parish purposes.

(*a*) By the statute, (sects. 8 and 17), the churchwardens and overseers of any parish are empowered to purchase lands whereon to erect workhouses for the poor, and are constituted a corporation for the purpose of taking and holding such lands, and all other lands belonging to the parish. These powers, so far as regards the purchasing of lands for workhouses, are not of much importance since the late act of the 4 & 5 Will. 4, c. 76, and they are now, according to the statute, 5 & 6 Will. 4, c. 69, s. 4, to be exercised under the control of the Poor Law Commissioners. The last act furnishes a particular form of conveyance, which it endows with extraordinary effects; but the precedent in the text may be found useful in framing conveyances in similar circumstances, especially as the statutory form does not appear to be obligatory, and is extremely inapplicable to many cases. It may be proper to observe, that the stat. 7 Will. 4 & 1 Vict. c. 50, extends the provisions of the last-mentioned acts to copyholds, and provides for their enfranchisement.

The operation of the statute 59 Geo. 3, c. 12, in divesting parish lands out of trustees and vesting it in the churchwardens and overseers.

But independently of the object of the precedent, the statute referred to deserves attention on account of its important effect upon property which has been vested in trustees for parishes. Many parishes are the owners of lands which have been vested in trustees, either for general parochial purposes or for the special benefit of some class of the parishioners. It has been the custom, when the trustees have been reduced to a small number, to appoint new trustees, and to have the lands conveyed to them upon the old trusts; and this course has been constantly pursued since the statute of the 59 Geo. 3, c. 12; for it was not imagined till recently, that the effect of the statute was, to divest all lands out of parochial trustees, and to vest them in the churchwardens and overseers,

present churchwardens, and G. H. and I. K., the present overseers of the poor of the parish of ——, in the town of

TO CHURCHWARDENS AND OVERSEERS.

as permanent corporate trustees. The statute enacts, (sect. 17), that the "churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, (*i. e.* all buildings, &c. which they had been authorized to take for the purposes of the act), *and also all other buildings, lands, and hereditaments, belonging to such parish:*" and it seems now to be settled by judicial decision, that, as a general rule, all property, which, at the date of the act, was vested in trustees for general parochial purposes, was immediately vested in the churchwardens and overseers as a corporation, and in trust for the parish.

The case in which this doctrine was established is *Doe* d. *Jackson* v. *Hiley*, 10 B. & C. 885, where it was held, that freehold lands, which had been vested in trustees for the benefit of the parish, and the profits of which were applicable to the purposes for which church-rates are levied, had by force of the statute become vested in the churchwardens and overseers.

In *Alderman* v. *Neate*, at the date of the statute, a lease of a poor-house was vested in certain persons in trust for the parish, and it was contended, that the decision in *Doe* d. *Jackson* v. *Hiley* was erroneous, and that the statute simply empowered the churchwardens and overseers to hold what was conveyed to them, and did not by its own force divest property out of trustees to vest it in the churchwardens and overseers. There can be no doubt that this is the fair and reasonable construction of the statute, but the Court considered the question settled by *Doe* v. *Hiley*, and decided accordingly. The cases of *Doe* d. *Higgs* v. *Terry*, 4 Ad. & Ell. 274, and *Doe* d. *Hobbs* v. *Cockell*, Id. 478, are confirmatory of the principle of *Doe* v. *Hiley*, although not exactly in point, inasmuch as it did not appear that the property in dispute was vested in trustees at the date of the statute. But, in *Ex parte Annesley*, 2 You. & Col. 350, it was held, on the authority of *Doe* v. *Hiley*, that freehold lands, held by feoffees in trust for the relief of the poor of a parish, were by force of the statute vested in the churchwardens and overseers. The correctness of the decision in *Doe* v. *Hiley*, has been questioned by Mr. Justice Patteson, (1 Per. & Dav. 193), and by the Vice-Chancellor; (*Att.-Gen.* v. *Lewin*, 8 Sim. 366; S. C. 1 C. P. Cooper, 51; and 2 You. & Col. 351, n.); and the latter judge has expressly decided, that the statute does not apply to copyholds, as the lord might thereby be deprived of his fines and otherwise injured. (*Att.-Gen.* v. *Lewin*, ubi supra; *In re Paddington Charities*, 8 Sim. 629). But in spite of the doubts thus thrown upon the case, and the obvious reason of the matter,

TO CHURCHWARDENS AND OVERSEERS.

——, [*purchasers*], of the other part: WHEREAS there being no workhouse belonging to the said parish of ——, the said churchwardens and overseers are, under the authority of an act of Parliament made and passed in the 59th year of the reign of his late Majesty, King George the Third, intituled "An Act to amend the laws for the relief of the poor," and by the direction of the inhabitants of the said parish in vestry assembled, about to erect in such parish a suitable workhouse (*b*); and in order thereto, and as and for the site of such intended workhouse and its appurtenances, the said churchwardens and overseers have, under such authority and by such direction as aforesaid, contracted with the said A. B. for the absolute purchase of the piece of ground hereinafter particularly mentioned and intended to be hereby bargained and sold, with its appurtenances and the inheritance thereof, in fee-simple in possession, free from incumbrances, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— to the said A. B. paid by the said churchwardens and overseers, at or immediately before the execution of these presents (the receipt of which said sum of £——, the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said churchwardens and overseers, their successors and assigns for ever by these presents), he, the said A. B., hath granted, bargained, sold, and confirmed, and by these presents doth grant, bargain, sell, and confirm unto the said churchwardens and overseers,

Recital of intention to erect a workhouse.

—and of the contract for purchase.

Witnesseth.

Consideration.

Receipt.

Bargain and sale.

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it is not now probable that *Doe* v. *Hiley* will be overruled as to freehold and leasehold property, although the Vice-Chancellor's doctrine as to copyholds will most likely be upheld.

If the trusts of the land be special and not for general parochial purposes, the lands, although held for the benefit of certain classes of parishioners, are not by force of the statute vested in the churchwardens and overseers. (*Allason* v. *Stark*, 1 Per. & Dav. 183).

(*b*) See supra, n. (*a*).

their successors and assigns (*c*) [*parcels—general words*]: To HAVE AND TO HOLD the said piece of ground and hereditaments, and all and singular other the premises hereby bargained and sold, or expressed and intended so to be, unto and to the use of the said churchwardens and overseers, their successors and assigns, in trust for the said parish of ——: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said churchwardens and overseers, their successors and assigns, in manner following (that is to say), [*covenants for title—for right to convey—for quiet enjoyment—free from incumbrances—and for further assurance; supra p.* 201]: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the said churchwardens and overseers, their successors or assigns, shall not at any time or times hereafter, upon any occasion, or for any purpose whatsoever, be at liberty to call upon the said A. B., his heirs or assigns, or require him or them to produce any deeds, evidences, or writings relating to the title of the said piece of ground, hereditaments, and premises, hereby bargained and sold, or intended so to be, or any part thereof, or to deliver any copies or abstracts of or extracts from any such deeds, evidences, or writings, anything hereinbefore contained, or any rule of law or equity to the contrary thereof in anywise notwithstanding (*d*): AND THE SAID churchwardens and overseers do hereby for themselves, their successors and assigns (but not so as to bind or charge themselves in their private or individual capacities, or their heirs, executors, or administrators), covenant with the said A. B., his heirs and assigns, that the said churchwardens and overseers, their successors or assigns, shall and

TO CHURCHWARDENS AND OVERSEERS.

Parcels.

Habendum.

Covenants for title.

Proviso against producing title-deeds.

Covenant by purchasers to erect and maintain a fence.

(*c*) It will be seen that the conveyance is by bargain and sale, and not by lease and release. See, too, the provisions of the 5th & 6th Will. 4, c. 69, s. 6.

(*d*) As to the necessity of a special proviso, where it is not intended that the purchaser shall have a right to require the production of the title-deeds, see supra, p. 44, n. (*a*).

TO CHURCHWARDENS AND OVERSEERS.

will within —— calendar months, from the day of the date of these presents, at the costs and charges of the said churchwardens and overseers, their successors or assigns, erect and set up, at or upon the extreme boundaries of the north and west sides of the said piece of ground hereby bargained and sold, or expressed and intended so to be, a strong and substantial fence, either of brick or sound oak, of the height of six feet at least, and shall and will at the like costs and charges of the said churchwardens, their successors or assigns, for ever thereafter keep and maintain the same fence in good order, condition, repair. IN WITNESS &c.

L.

MERGER OF TITHES.

FORM *of* DECLARATION *merging* TITHES, *under the statute of* 6 *&* 7 *Will. IV. c.* 71, *when such Merger is declared by a separate Instrument* (*a*).

KNOW ALL MEN by these presents, I, —— of ——, in the county of ——, gentleman [*or whatever be the party's*

(*a*) Before the recent alterations in the law, unity of seisin of the tithes and of the land out of which they issued, was of no avail to extinguish the tithes; they continued to subsist independently, and could by no means whatever be merged. They were not deemed appurtenances to the land, and did not pass in a conveyance of it, "with all profits, commodities, advantages, emoluments, hereditaments, and appurtenances." (*Phillips* v. *Jones*, 3 Bos. & Pul. 362; *Chapman* v. *Gatcombe*, 2 Bing. N. C. 516).

Statute 6 & 7 Will. 4, c. 71.

But, by the statute 6 & 7 Will. 4, c. 71, s. 71, it is enacted, "that it shall be lawful for any person seised in possession of an estate in fee-simple or fee-tail, of any tithes or rent-charge in lieu of tithes, by any deed or declaration, under his hand and seal, to be made in such form as the said commissioners, [*the tithe commissioners*], shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have

proper description], being lawfully seised of an estate in possession in fee-simple [*or* in fee-tail, *as the case may be*], MERGER OF TITHES.

been charged." And by the stat. 7 Will. 4 & 1 Vict. c. 69, such deeds and declarations are exempted from stamp duty.

These powers are explained and greatly extended by the recent statute 1 & 2 Vict. c. 64, which enacts, (sect. 1), that, from and after the passing thereof, "it shall be lawful for any person or persons who shall, either alone or together, be seised of or have the power of acquiring or disposing of the fee-simple in possession of any tithes, or rent-charge in lieu of tithes, by any deed or declaration, under his or their hand and seal, or hands and seals, to be made in such form as the tithe commissioners for England and Wales shall approve, and to be confirmed under their seal, to convey, appoint, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of or on which the same shall have been issuing or charged; and every such deed or declaration as aforesaid shall be valid and effectual for the purpose aforesaid, although the same may not be executed, or made in the manner, in or with the formalities or requisites which, if this act had not been passed, would have been essential to the validity of any instrument by which such person or persons could have acquired or disposed of the fee-simple in possession of such tithes or rent-charge in lieu of tithes." By the same statute it is further enacted (sect. 2), "that no deed or declaration authorized by this act for the merging of tithes shall be chargeable with any stamp duty;" and (sect. 3), "that in all cases where tithes, or rent-charge in lieu of tithes, and the lands out of which the same are payable, are both settled to the same uses, it shall be lawful for any person in possession of an estate for life in both such lands and tithes, or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal to be made, in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of such tithes or rent-charge, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the land out of which such tithes shall have been issuing, or in which such rent-charge shall have been charged;" and (sect. 4), that the provisions in the act of the 6 & 7 Will. 4, c. 71, s. 71, and this act contained, "as to the merger of any tithe, or rent-charge in lieu of tithe, shall be deemed and taken to extend to all lands, being copyhold of inheritance or copyhold for lives, or of any other tenure whatsoever." Section 5 of the above act explains the meaning of the words "person," "lands," and "tithes," as used in it.

Statute 1 & 2 Vict. c. 64, s. 1.

Sect. 2.

Sect. 3.

Sect. 4.

With regard to the language of the third section of this act, it may be observed, that the words "person in possession of an estate for life" are not very technical or precise. What they are intended to mean, is, it is presumed, a person tenant for life in possession, and probably this is the con-

Observations on the statute.

MERGER OF TITHES.

in the tithes [*or* rent-charge, *if the declaration is not made till after an agreement for a rent-charge in commutation of such tithes*] issuing from or arising upon [*or* charged upon, *if it be a rent-charge that is to be merged*] the lands hereinafter described, situate in the parish of ——, in the county of ——, that is to say, [*here describe the lands fully and accurately*], do hereby declare it to be my will and intent that the said tithes [*or* rent-charge, *as the case may be*] shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands, according to the provision in that behalf contained in a statute made in the reign of his present Majesty King William the Fourth, intituled, "An Act for the Commutation of Tithes in England and Wales."

In testimony whereof, I have hereunto subscribed my

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struction they will receive; but whether they will be held to apply to the case of a tenant for life in the receipt of the rents and profits, but whose estate is preceded by a term of years, is not clear.

—on the form of merger.

The precedent in the text is a copy of the printed form published by the Tithe Commissioners, under the authority of the act 6 & 7 Will. 4, c. 71; but it is obviously inapplicable to a great number of cases. The commissioners have not published any form for merger under the stat. 1 & 2 Vict. c. 64. It is not essential to adhere to the printed form, even where circumstances permit; although the deed of merger must be approved by the commissioners, and confirmed under their seal; and it will probably be found most convenient to adhere to the usual forms of conveyancing, which have been tested by experience, rather than attempt to follow the devices of the commissioners. In the printed paper (O. 1.)—19, issued by the commissioners, it is observed, that "as the title to a rent-charge in commutation of tithe must be looked for in the instrument confirmed by the Tithe Commissioners, (meaning the general agreement for commutation) it will be convenient to have the merger evidenced by that instrument, rather than by a separate one, which may be lost or secreted;" and the following form is recommended for introduction into any agreement for commutation, immediately after the recitals stating that a person is seised in possession of an estate in fee-simple or fee-tail in any tithes: "And the said —— hereby declares it to be his will and intent, certified by his seal and signature hereunto annexed, that the said tithes shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands." See further on this subject supra, p. 79, n. (*b*).

name, and affixed my seal, this —— day of ——, in the year of our Lord ——. MERGER OF TITHES.

(*Signature*) *Seal.*

LI.

ASSIGNMENT *of a* TERM *already* ATTENDANT *upon the Inheritance to a Trustee for a* PURCHASER (*a*). ASSIGNMENT OF ATTENDANT TERM.

THIS INDENTURE, made &c., BETWEEN A. B. of &c. [*the administrator with the will annexed of E. J., the last* Parties.

(*a*) The law with regard to terms attendant upon the inheritance is fully stated in 1 Sug. V. & P. Ch. IX. s. 11 ; see too, supra, p. 64, n. (*a*), and p. 65, n. (*b*). An opinion was expressed in n. (*a*), p. 65, that, in the absence of an express stipulation to the contrary, the expense of the perusal of the assignment, both on behalf of the assignor and the vendor, must in all cases be borne by the vendor. This opinion is still adhered to, but it is understood that in the recent case of *Johnson* v. *George*, 12 July, 1838, where the sale was made under a condition that the expense of all "assignments and surrenders of terms shall be borne by the person or persons requiring the same," it was held by the Vice-Chancellor that the fees of counsel for, and solicitors' charges attending the perusal of the assignments of the terms on behalf of the trustees of the terms and of the vendors, and the execution of the assignments by the trustees, must be borne by the purchasers. General law of terms attendant upon the inheritance.

It will be fitting to explain here the structure of the deeds by which terms are assigned to attend the inheritance. Structure of assignments of terms.

If the term has never been assigned to attend the inheritance, the recitals will commence (assuming that the circumstances of the fee do not require an earlier commencement) with the deed creating the terms, setting out in the recital of that deed the parcels (or so many of them as are intended to be assigned), (supra, p. 209, n. (*c*),) and the trusts or purposes for which the term was created. The recitals will then proceed in the order of date, tracing the devolution of the fee and of the term up to the date of the intended assignment, and shewing that the trusts or purposes for which the term was created, have all been satisfied, and that the owner of the fee has thereby become entitled to call on the termor to —not previously attendant on the inheritance.

ASSIGNMENT OF ATTENDANT TERM.

trustee of the term], of the first part, C. D. of &c., and M. D. his wife, and E. F. of &c., spinster [*the vendors*] of

assign the term to attend the inheritance. If the assignment be made, as it generally is, on the occasion of a conveyance of the fee, and the objects or purposes of the term are satisfied out of the purchase-money, the assignment is commonly made by the deed of conveyance, because the existence of the term is necessarily disclosed on the face of the conveyance. (See supra, Precedent XXVII. p. 267). But if the trusts or purposes of the term have been antecedently satisfied, and the recitals required for the purpose of the conveyance do not necessarily disclose the existence of the term, the assignment should be taken by a separate deed, in order not to show on the face of the conveyance that the legal estate is outstanding. The proper parties to such separate deed will be the termor of the first part, the vendor of the second part, the purchaser of the third part, and the intended trustee for the purchaser of the fourth part, and the deed will bear even date with the conveyance of the fee.

—and previously attendant on the inheritance.

If the term have been already assigned to attend the inheritance, the assignment should (unless on very trifling transactions) be made by a separate deed, having the same parties and date as the last-mentioned. But the recitals of an assignment of a term which has previously been assigned to attend the inheritance, differ materially from the recitals of an assignment of a term in gross. For with the latter, as has been already explained, it is necessary to shew the original trusts or purposes of the term, and to trace the devolution, both of the fee and the term, from the date of the creation of the latter. But in the case of an assignment of a term which has been previously assigned to attend the inheritance, it is sufficient to recite the deed creating the term in the most general way, taking care only to give the parcels, the date of the commencement, and the duration of the term. We then recite, that, by divers mesne assurances and acts in the law, and ultimately, by an indenture, of which the date and parties are given, the fee became vested in the person directing the assignment, or in those under whom he claims, and that by divers mesne assignments and acts in the law, and ultimately by an indenture, of which the date and parties are given, the term became vested in the trustee, in trust for the persons directing the assignment, or those under whom he claims. That is, we proceed at once to the last occasion on which the term was assigned to attend, and shew to whom it was assigned, and in trust for whom. The intermediate recitals are obviously of no moment, because the trustee can only be affected by the acts of his own cestui que trust, and is in nowise concerned with the dispositions either of the term or the fee, prior to the assignment to himself.

From the period to which the narrative is thus brought down the recitals will proceed in the usual manner, setting forth all the deeds,

ASSIGNMENT OF ATTENDANT TERM.

Recital of creation of term.

the second part, G. H. of &c., and J. K. of &c. [*purchasers*] of the third part, and L. M. of &c. [*the purchasers' trustee*], of the fourth part: WHEREAS, by an indenture bearing date the —— day of —— and made or expressed to be made between [*the parties*], the said —— and —— did demise unto the said ——, his executors, administrators, and assigns, ALL THAT &c. [*parcels*], with the rights, members, and appurtenances to the same premises belonging, to hold the same unto the said——, his

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instruments, and events, affecting the fee subsequently to that period, and concluding of course with the conveyance to the purchaser. And a separate chain of recitals will, if necessary, be added of all deaths, wills, administrations, and other incidents by which the term has been affected since the last assignment. This is one of the instances in which there are two distinct sets of recitals in one deed, each following its own order of date, independently of the other. It would diminish instead of adding to the clearness of the statement if the two chains of recitals, which in themselves are quite distinct, were blended in one chain, with an uniform order of date. See supra, p. 11.

It is usual to make the assignment of a term bear even date with the conveyance on the occasion of which it is executed, and to make the vendor and all the incumbrancers, or other conveying parties, join in the deed of assignment, in order to direct the assignment. But this cannot be considered essential, and in practice, when the conveying parties are numerous, many of the less important are not made parties to the assignment of the term, in order to avoid the expense of obtaining the perusal of it on their behalf, and the execution of it by them. In fact, it is not necessary for any of the vendors or conveying parties to be parties to the assignment, for as soon as the purchase-deed is executed the trustee of the term becomes a trustee for the purchaser, and may be compelled forthwith, or at any subsequent time, to assign the term to a trustee of the purchaser's nomination. The concurrence of the immediate vendor is no more necessary than that of any other persons who have been for a time interested in the fee since the last assignment, and who are never made parties. It is said to be the practice of some conveyancers not to give any recitals affecting the fee, except the conveyance on which the last assignment was made, and the conveyance to the purchaser, and to satisfy the trustee as to the mesne devolution of the fee by the production of an abstract of title. But this is certainly an unusual practice.

Some further information on this subject may be obtained from the perusal of the precedent in the text, and the subsequent notes thereon. See, too, the next precedent.

ASSIGNMENT OF ATTENDANT TERM.

executors, administrators, and assigns, from the date thereof, for the term of ——years, by way of mortgage (*b*): AND WHEREAS, by divers mesne assurances and acts in the law, and ultimately by indentures of lease and release, bearing date respectively the 15th and 16th days of April, 1819, the release being made or expressed to be made between [*parties*], the reversion, freehold, and inheritance, expectant on the said term of —— years, of and in the said messuage, lands, hereditaments and premises hereinbefore particularly mentioned and comprised in the same term, were conveyed and assured to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as the said T. B. should, in manner therein mentioned, appoint, and in default of and until and subject to such appointment, to the use of the said T. B. for his life, with remainder to the said T. P., his executors, administrators, and assigns, during the life of the said T. B., in trust for him and his assigns, with remainder to the use of the said T. B. his heirs and assigns: AND WHEREAS, by divers mesne assignments and acts in the law, and ultimately by (*c*) the said indenture of the 16th day of April, 1819, the said premises comprised in the said term of —— years

—of the last conveyance of the reversion on which the term was assigned.

—of the last assignment of the term.

(*b*) It is not necessary to state the nature and amount of the mortgage as in a common recital, for the subsequent recitals shew that the objects of the deed, whatever they were, were fulfilled before the last assignment of the term. And so, if the term were created by settlement, it will be sufficient to recite "that by an indenture bearing date &c., and made &c., All that [*parcels to be assigned*] were, with the appurtenances, conveyed and assured to the uses therein mentioned, including a limitation to the use of A. B. and C. D., their executors, administrators, and assigns, for the term of —— years, to commence from ——, upon the trusts therein declared of the same."

(*c*) If the last assignment of the term were not made by the same deed as the corresponding conveyance of the freehold, the recital will be, "an indenture bearing date the —— day of ——, and made, or expressed to be made, between [*parties*]." And if the last conveyance and the assignment bear even date they may be distinguished as the "indenture of release of the —— day of ——," and "the indenture of assignment of the —— day of ——."

were assigned to the said E. J., his executors, administrators, and assigns (*d*), for all the residue then to come of the said term, in trust for the said T. B., his heirs, appointees, and assigns, to be assigned and disposed of from time to time as he or they should direct or appoint, and in the meantime in trust, and to the intent, that the residue of the said term of —— years, might wait upon and attend the freehold reversion and inheritance of the same hereditaments and premises, for the sole use and benefit of the said T. B., his heirs, appointees, and assigns, and to protect the same from all subsequent incumbrances, if any such there were (*e*): AND WHEREAS, by an indenture bearing date the

ASSIGNMENT OF ATTENDANT TERM.

—of mortgage of the reversion for a term.

(*d*) There is an obvious inaccuracy in this form of recital; for it is not by the divers mesne assignments and acts in the law and the ultimate indenture that the premises are assigned to E. J., his executors, administrators, and assigns, but by the ultimate indenture only. Hence the recital is often given, that "by divers mesne assignments and acts in the law, and ultimately by an indenture &c., the said premises comprised in the said term of —— years, became vested in the said E. T. for all the residue" &c. But then the reference back from the parcels in the actual assignment is less convenient; for, with the recital in the text, the reference is to the hereditaments by the ultimate indenture assigned, or expressed to be assigned, a form which manifestly fails when the recital has been of a vesting and not of an assignment. If the suggested variation be made in the recital it would seem that the reference of the parcels should be to the hereditaments, which "by the divers mesne assignments and acts in the law hereinbefore referred to, and the said indenture of the —— day of ——, became vested in the said [*trustee*] for the residue then to come of the said term of —— years, as hereinbefore is mentioned." But in truth the inaccuracy of the recital in the text is so slight, and has been so long sanctioned by practice, that the necessity of any alteration may be doubted. In the previous recital as to the freehold, there is an inaccuracy of the same kind, which may perhaps be removed by reciting that "by divers mesne assurances and acts in the law, and the ultimate indenture, the reversion &c., became limited to such uses" &c; or, if the ultimate indenture were a conveyance in fee, "became vested in —— for an estate of inheritance in fee-simple."

Remarks on the form of recital.

(*e*) If the abstract do not furnish the means of stating this trust fully, or if conciseness be urgently desired, the following recital may suffice:—

"In trust for the said T. B., his heirs, appointees, and assigns, and to attend the inheritance."

Variation.

ASSIGNMENT OF ATTENDANT TERM.

26th day of June, 1823, and made or expressed to be made between [*parties*], in consideration of the sum of £——, to the said T. B. paid by the said T. C., the said T. B., in pursuance of the said power limited to him by the said indenture of the 16th day of April, 1819, did, by the said indenture now in recital, direct and appoint, and also grant and demise (*f*) unto the said T. C., his executors, administrators, and assigns, the messuage, lands, hereditaments and premises, comprised in the said indenture of the 16th day of April, 1819, to hold the same unto the said T. C., his executors, administrators, and assigns, for the term of one thousand years, without impeachment of waste, subject nevertheless to a proviso in the said indenture now in recital contained for redemption of the same premises, on payment by the said T. B., his heirs, executors, administrators, or assigns, unto the said T. C., his executors, administrators, or assigns, of the sum of £500, at the time therein mentioned, with interest for the same after the rate, at the times, and in manner therein mentioned: AND WHEREAS the said

—of the will of the owner of the reversion.

T. B. duly made, signed, and published his last will and testament, bearing date the 19th day of September, 1826, and thereby gave and devised unto his two nieces, the said M. D. and E. F. (among other things), all that his freehold, messuage, or tenement, buildings, farms, lands, hereditaments, and premises, called the ——, purchased by him of ——, with the appurtenances (being the premises comprised in the said indenture of the 16th day of April, 1819), to hold the same unto the said M. D. and E. F., their heirs and assigns for ever, as tenants in common: AND WHEREAS the said T. B. died

—of his death.

in the month of August, 1828, without having revoked or altered his said will: AND WHEREAS the said T. C. duly made, signed, and published his last will and testament, bearing date the 6th day of January, 1829, and thereby

—of the will of the mortgagee.

(*f*) This deed, or the recital of it, is irregularly framed; for the appointment, and the grant, and the demise, should have been kept distinct, supra, p. 212, n. (*g*).

after bequeathing several legacies, gave unto his son E. C., all the residue of his personal estate and effects whatsoever and wheresoever, to and for his own use, and the said T. C. thereby appointed the said E. C. sole executor of his said will: AND WHEREAS the said T. C. died in the month of March, 1829, without having revoked or altered his said will, and the same was proved by the said E. C., on the 12th day of July, 1829, in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS, by an indenture of release bearing even date with, but executed before the execution of these presents, grounded on a lease for a year, and made or expressed to be made between the said C. D., and M. D., and E. F., of the first part, the said E. C. of the second part, the said G. H. and R. H., his wife, of the third part, the said I. K. of the fourth part, and X. Y. of the fifth part, in consideration of the sum of £—— to the said E. C., and the sum of £—— to the said C. D., and M. D., and E. F., paid by the said I. K., the said C. D. and the said M. D., with the concurrence of the said C. D., (testified as therein mentioned), and the said E. F. did grant, release, confirm, and dispose of in manner therein mentioned, and the said E. C., to the intent that the said term of one thousand years might be merged and extinguished in the reversion of the premises therein comprised, did surrender unto the said I. K. and his heirs, the messuage, lands, and other hereditaments therein mentioned (including the said hereditaments hereinbefore mentioned and comprised in the said term of —— years) [*the attendant term*], to hold the same unto the said I. K. and his heirs, to the use of the said G. H. and his assigns for his life, with remainder to the use of the said I. K. and his heirs, during the life of the said G. H., in trust for him and his assigns, and to preserve contingent remainders, with remainder to the use of the said X. Y., his executors, administrators, and assigns, for the term of ninety-nine years, upon the trusts therein mentioned, for securing an annuity for £—— to the said R. H. for her life or widowhood, in case she survived the said G. H., and an annuity of £—— to S. F. for her life, if she survived the

ASSIGNMENT OF ATTENDANT TERM.

—of his death, and the probate of his will.

—of deed of even date being the purchase deed.

ASSIGNMENT OF ATTENDANT TERM.

said G. H.; and from and after the expiration or sooner determination of the said term of ninety-nine years, and in the meantime subject thereto, and to the trusts thereof, to the use of all and every the child and children of the body of the said G. H., begotten or to be begotten, and their heirs and assigns, in equal shares as tenants in common: AND WHEREAS the said E. J. died on the —— day of ——, having first duly made, signed, and published his last will and testament in writing, bearing date the 17th day of November, 1832, and having thereby appointed two executors thereof, who both died without proving the same, and letters of administration of the goods and chattels, rights, and credits of the said E. J., with the said will annexed, were on the 4th day of May, 1833, granted to the said A. B. by the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS the said G. H. and I. K. are desirous that the said premises comprised in the said term of —— years (*g*), should be assigned by the said A. B. to the said L. M., his executors, administrators, and assigns, upon the trusts and in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said desire, and in consideration of the premises, he the said A. B., at the request and by the direction of the said C. D. and M. D., and the said E. F., and upon the nomination and appointment of the said G. H. and I. K., (testified by their severally being parties to and executing these presents), hath assigned, and by these presents doth assign unto the said L. M., his executors, administrators, and assigns,

—of the death of the trustee of the term, and of administration to him.

—of desire that term may be assigned.

Witnesseth. Assignment.

(*g*) See, with reference to the frame of this recital, the remarks contained in the ensuing note, on the manner of referring to the parcels. The recital must, of course, be made to correspond with the description of the parcels. When the term comprises more property than that intended to be assigned, the recital may refer to the parcels as comprised in the term "and hereinbefore particularly mentioned," or as "such of the said hereditaments comprised in the said term as were assigned or expressed to be assigned" by the last assignment. These, or such similar phrases as the circumstances of the case require, will sufficiently distinguish the parcels intended to be assigned, from the others comprised in the term.

ALL SUCH and so many, and such part and parts of the messuage, land, and hereditaments by the said indenture of release of even date herewith granted and released, or expressed and intended so to be, as by the said indenture of the 16th day of April, 1819, were assigned or expressed to be assigned to the said E. J., his executors, administrators, and assigns, for the residue of the said term of —— years (*h*), as hereinbefore is mentioned, with their appurtenances, AND ALL the estate, &c.: TO HAVE AND TO HOLD the said messuage, land, and hereditaments, and all and singular other the premises hereby assigned, or expressed and intended so to be, unto the said L. M., his executors, administrators, and assigns, for the residue now to come of the said term of —— years, UPON TRUST for the several persons who shall from time

ASSIGNMENT OF ATTENDANT TERM.

Parcels.

Habendum.

(*h*) It is necessary to pay considerable attention to the mode of stating, or rather of referring to the parcels intended to be assigned. In the case in the text the purchase deed comprises the whole of the property in the term, and the whole was assigned on the last assignment; hence the reference is to such of the hereditaments comprised in the purchase deed as were assigned on the last assignment. And the reference may be the same if the purchase deed comprises the whole property included in the term and more. But if the purchase deed comprises only part of the property included in the term, and assigned on the last assignment, the mode of description must be reversed, and the reference be to such of the hereditaments included in the last assignment as are comprised in the purchase deed.

Mode of describing the parcels in assignments of terms.

Again, a variation is required, if since the last assignment there has been an inclosure act, or other act, by means of which the property now included in the term, or subject to the trusts thereof, is different from that included in it on the last assignment. The reference will then be to the hereditaments "assigned or expressed to be assigned to the said E. T., his executors, administrators, and assigns, for the residue of the said term of —— years, or which are now by virtue of the said inclosure act [*or such other act as it may be*], or by any other means whatsoever, comprised in the same term, and subject to the trusts thereof." And, of course, various combinations of circumstances will demand variations in the language of the description, which must be supplied by the ingenuity of the draftsman. His principle should be to pay little attention to the form, but to attend closely to the fact, to make out clearly and exactly what he means to comprise in his assignment, and to introduce words of description which will aptly express his meaning.

ASSIGNMENT OF ATTENDANT TERM.

to time be entitled to or interested in the reversion expectant on the said term of —— years of and in the premises therein comprised, under the limitations and trusts of the said indenture of even date herewith, and to assign and dispose of the same as they shall from time to time direct (*i*), and in the meantime to permit and suffer the residue of the said term of —— years to wait upon and attend the reversion, freehold, and inheritance of the premises therein comprised, and to protect the same from all mesne incumbrances, if any such there be: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said L. M., his executors, administrators, and assigns, that he the said A. B. hath not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said messuage and other hereditaments hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. IN WITNESS &c. (*j*).

Upon trust.

Covenant by the trustee against incumbrances.

(*i*) In the case in the text the freehold is conveyed to the uses of a settlement, and hence the trust of the attendant term differs somewhat from the common form, which runs as follows:—

"UPON TRUST for the said [*purchaser*], his [*if the conveyance be to uses to bar dower, insert* "appointees,"] heirs and assigns, and to assign and dispose of the same as he or they shall from time to time direct,"

continuing as in the text.

Cases to which the protection of the legal estate is extended.

(*j*) It may be proper to take this opportunity of referring the practitioner to the recent case of *Jones* v. *Powles*, (3 My. & Ke. 581); in which it was laid down by the Master of the Rolls "that the protection of a legal estate extends not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title, asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession, and

LII.

ASSIGNMENT *of* TWO ATTENDANT TERMS *in* SEPARATE *Properties to a Trustee for a Purchaser* (*a*).

ASSIGNMENT OF TWO ATTENDANT TERMS.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*assignor*], of the first part; C. D., of &c., and E. F. Parties.

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the falsehood of the fact asserted could not have been detected by reasonable diligence." The person who in this case claimed and obtained the protection of the legal estate, derived title under a will which turned out to have been forged. The subject will be more fully discussed in another part of this work, but most of the cases connected with it are cited in *Jones* v. *Powles*.

(*a*) In the precedent, the skeleton of which is given in the text, it appears that both the terms had become vested in one trustee at the date of the assignment. If it happen that the terms are in different trustees, the frame of the recitals will not be materially different; they will commence with the creation of the terms in the order of date, and then pass in the usual way to those conveyances of the respective reversions on which the terms were last assigned to attend, and to the assignments themselves; and afterwards trace the devolution of the fee in the usual manner. There will be distinct witnessing parts for each term, each having its own habendum referring to the subsequent declaration of trust, and each being followed by the covenant against incumbrances from the assignor; and the draft will conclude with the declaration of trust in the text, introduced by the following form,

Form of assignment when the terms are in different trustees.

"And it is hereby agreed and declared between and by the parties to these presents, that the said [*trustee*], his executors, administrators, and assigns, shall stand possessed of and interested in the said premises hereinbefore assigned, or expressed and intended so to be, for the respective residue now to come of the said terms of —— years and —— years respectively, in trust, &c."

as in the text. See further, supra, notes to Precedent LI.

ASSIGNMENT OF TWO ATTENDANT TERMS.

of &c., [*trustees of legal estate in the premises*], of the second part; the said A. B. and G. H., of &c., [*vendors*], of the third part; I. K., of &c., [*purchaser*], of the fourth part; and L. M., of &c., [*purchaser's trustee*], of the fifth part, [*recites indenture of mortgage of the 24th of June, 1781, creating a term of 1,000 years, see supra, p. 451, and a similar indenture of the 29th of June, 1798, creating a term of 1,000 years in other property—that by divers mesne assurances and acts in the law, and ultimately by an indenture, bearing date &c., the reversion of the property comprised in the first term had become vested in X. Y., in fee, (see the form supra, p. 452,)—that by divers other mesne assurances and acts in the law, and ultimately by the said indenture of &c. (the last mentioned), the reversion of the property comprised in the second term had become vested in X. Y., in fee, (same form)—that by divers mesne assignments and acts in the law, and ultimately by an indenture, bearing date &c., the property comprised in both terms had been assigned to A. B., his executors, administrators, and assigns, in trust to attend, (see the form supra, p. 452), and recites the subsequent dealings with the fee, from which it appears that the legal estate in the premises is outstanding in C. D. and E. F., and that A. B. and G. H. are trustees for sale*]:

Recitals.

Recital of conveyance to purchasers.

AND WHEREAS, by an indenture of release, bearing date the —— day of ——, grounded so far as the same operated as a release on a lease for a year, and made or expressed to be made between [*parties*], for the considerations therein mentioned, the said C. D. and E. F., by the direction of the said A. B. and G. H., testified as therein mentioned, did release, and the said A. B. and G. H. did release unto the said I. K. and his heirs, (among other hereditaments), all and singular the said messuage, lands, and hereditaments, comprised in the said several terms of 1,000 years and 1,000 years respectively, with the appurtenances, (with an exception of such estate or interest, or estates or interests, if any, as was or were vested in the said A. B., of or in the same premises respectively, or any part or parts thereof respectively, for

any term or term of years) (*b*): To hold the same unto the said I. K. and his heirs: To such uses, upon such trusts, and to and for such intents and purposes, and with, under, and subject to such powers, provisoes, and declarations, as the said I. K. should, by any deed or deeds, with or without power of revocation and new appointment, direct, limit, and appoint, and for default of and until and subject to such direction, limitation, or appointment, to the use of the said I. K. and his assigns, during his life, without impeachment of waste, with remainder to the use of the said —— and his heirs, during the life of the said I. K., in trust for him and his assigns, with remainder to the use of the said I. K., his heirs and assigns for ever: AND it is by the said indenture now in recital declared, that, if the said I. K. shall die leaving a widow, such widow shall not be entitled to dower out of or in the said hereditaments and premises, or out of or in any part thereof: AND WHEREAS the said I. K. is desirous that the said premises, respectively comprised in the said several terms of 1,000 years and 1,000 years respectively, should be assigned by the said A. B. to the said L. M., his executors, administrators, and assigns, upon the trusts and in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said desire, and in consideration of the premises, the said A. B., at the request and by the direction of the said G. H., and with the privity and approbation of the said C. D. and E. F., and on the nomination of the said I. K., (testified by their respectively being parties to and executing these presents) hath assigned, and by these presents doth assign unto the said L. M., his executors, administrators, and assigns, ALL SUCH and so many, and such part and parts of the said messuage, lands, and hereditaments, by the said indenture of the —— day of —— [*the purchase-deed*] released or expressed,

ASSIGNMENT OF TWO ATTENDANT TERMS.

—of desire that terms shall be assigned to attend.

Witnesseth.

Parcels.

(*b*) An exception of this kind must always be inserted if any of the conveying parties are trustees of the term. It will be observed, that, in this case, the legal estate of freehold being outstanding, prevented the merger as to one moiety of the term, which would otherwise have ensued.

ASSIGNMENT OF TWO ATTENDANT TERMS.

and intended so to be, as by the said indenture of the —— day of —— [*the assignment to A. B.*] were assigned, or expressed to be assigned, unto the said A. B., his executors administrators, and assigns, for the respective residue then to come of the said several terms of 1,000 years, and 1,000 years respectively, with the appurtenances, AND ALL the

Habendum.

estate, &c.: TO HAVE AND TO HOLD the said messuage, lands, and hereditaments, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said L. M., his executors, administrators, and assigns, for the residue now to come therein respectively of the said terms of 1,000 years and 1,000 years

Declaration of trust.

respectively(*c*): NEVERTHELESS in trust for the said I. K., his appointees, heirs, and assigns, and to assign and dispose of the same respectively, as he or they shall from time to time direct or appoint, and in the meantime upon trust to permit the residue of the same several terms of years respectively to wait upon and attend the reversion, freehold, and inheritance of the premises therein respectively comprised, and to protect the same from all mesne incumbrances, if any such there be. [*Covenant by A. B. with L. M., his executors, administrators, and assigns, against incumbrances, supra, p.* 458.] IN WITNESS &c.

(*c*) The following more elaborate form is sometimes employed:—

"TO HAVE AND TO HOLD *all such* and so many, and *such* part and parts of, the said premises hereinbefore assigned, or expressed and intended so to be, as are comprised in the said term of —— years, created by the said indenture of the —— day of ——, unto the said [*trustee*], his executors, administrators, and assigns, for the residue now to come of the same term, upon and for the trusts, intents, and purposes hereinafter declared, expressed, and contained of and concerning the same; AND TO HAVE, &c."

A similar habendum for the other term. A common declaration of trust is afterwards inserted, introduced in the manner mentioned in the preceding note. Of course, if the terms are for different numbers of years, there is no occasion to distinguish them by reference to the deeds by which they were created. (See, further, on assignments of terms, the notes to Precedent LI., supra).

MORTGAGES.

LIII.

MORTGAGE *in* FEE, *with* POWER OF SALE (*a*).

MORTGAGE IN FEE.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., [*mortgagee*], of the other part: WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made, or expressed to be made, between [*parties*], the messuages, farms, lands, and other hereditaments therein mentioned, including the hereditaments hereinafter particularly mentioned, and intended to be hereby appointed and released, were conveyed and assured, (but as to certain of the same hereditaments therein mentioned, (including the said hereditaments intended to be hereby appointed and released), subject to certain annuities of £4, £2, and £1, chargeable thereon, by virtue of the will of I. S.), to such uses upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, as

Parties.

Recital of conveyance to uses to bar dower, in favour of the mortgagor.

(*a*) The narrative recitals, witnessing parts, and habendums of mortgages, do not differ in any material particular from the corresponding parts of purchase-deeds, except that to each witnessing part which has no habendum, and to each habendum is subjoined a reference to the subsequent proviso for redemption. Hence, many of the preceding observations on purchase-deeds, particularly of those contained in the notes to Precedents XVI. and XVII., will be equally applicable to mortgages; and the following notes will be chiefly directed to those things which are peculiar to mortgages.

General remarks on the construction of mortgages.

MORTGAGE IN FEE.

the said A. B. should by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of two or more credible witnesses, direct, limit, or appoint, and in default of and until and subject to such direction, limitation, or appointment, to the use of the said A. B. and his assigns for his life, with remainder to the use of the said [*trustee*] and his heirs, during the life of the said A. B., in trust for him and his assigns, with remainder to the use of the said A. B., his heirs and assigns, for ever (*b*): AND WHEREAS the said C. D. has agreed to advance and lend to the said A. B. the sum of £1,000, upon having the repayment of the same, with interest after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned (*c*): NOW THIS INDENTURE WIT-

—of agreement for loan.

Witnesseth.

(*b*) With respect to this recital, see supra, p. 207, n. (*b*); p. 209, n. (*c*); and p. 210, n. (*d*).

Recital of the contract for the loan.

(*c*) The recital of the contract for the loan is somewhat shorter than the usual form, which runs as follows:—

"AND WHEREAS the said A. B., having occasion for the sum of £1,000, hath applied to and requested the said C. D. to advance and lend him the same, which he the said C. D. hath agreed to do upon having the repayment of the said sum of £1,000, with interest for the same in the meantime, after the rate hereinafter mentioned, secured to him, the said C. D., his executors, administrators, and assigns, in manner hereinafter mentioned:"

There are other forms longer than this, and consisting of two distinct recitals, one mentioning the request and the other the willingness to comply with it; but, as the contract in the text states all that is essential, that, or a nearly similar form, is generally used in this collection. It is not very easy to see why it should be stated, that the mortgagor has occasion for the money, for if he chooses to borrow it without having occasion for it, it is quite the same to the mortgagee; and it appears superfluous to state to whom the repayment is to be secured, for repayment necessarily implies payment to the lender or his representatives. The common expression, that the loan is made at the request of the mortgagor, may well be spared, for his wish for the loan must

NESSETH (*d*), that, in pursuance of the said agreement, and in consideration of the sum of £1,000, at or immediately before the sealing and delivery of these presents, to the said A. B. paid by the said C. D., (the receipt of which said sum of £1,000, he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns for ever, by these presents), And pursuant to, and by force and virtue, and in exercise and in execution of the power or authority to him the said A. B. for this purpose given by the said indenture of the —— day of ——, and of every or any other power or authority in anywise enabling him in this behalf, he the said A. B. doth by this present deed or instrument in writing, sealed and delivered by him the said A. B. in the presence of the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by him the said A. B., direct, limit, and appoint that all and singular the hereditaments hereinafter particularly mentioned, and intended to be hereby released, with the appurtenances, shall henceforth go, remain, and be to the use of the said C. D., his heirs and assigns, for ever, subject, nevertheless, to the said several annuities, hereinbefore particularly mentioned, (so far as the same are charged thereon), and subject to the proviso for redemption hereinafter contained (*e*): AND THIS INDENTURE ALSO WITNESSETH,

MORTGAGE IN FEE.

Consideration.

Receipt.

Appointment to mortgagee.

obviously be inferred from his accepting it. It is quite enough to recite that the mortgagee has agreed to lend the money upon the intended security.

(*d*) As to the manner of exercising a power, and the structure of a deed of this nature, see supra, p. 211, n. (*e*), p. 212, notes (*f*) and (*g*).

(*e*) The reference to the proviso for redemption is often made thus:— "subject nevertheless to the proviso or condition hereinafter contained for redemption of the said premises."

Mode of referring to the proviso for redemption.

But there does not seem to be any thing gained by this more elaborate expression. The form sometimes found, of "subject to the proviso for redemption of the same premises hereinafter contained," is erroneous, as making "premises," and not "proviso," the substantive to which

MORTGAGE IN FEE.

the said A. B. should by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of two or more credible witnesses, direct, limit, or appoint, and in default of and until and subject to such direction, limitation, or appointment, to the use of the said A. B. and his assigns for his life, with remainder to the use of the said [*trustee*] and his heirs, during the life of the said A. B., in trust for him and his assigns, with remainder to the use of the said A. B., his heirs and assigns, for ever (*b*): AND WHEREAS the said C. D. has agreed to advance and lend to the said A. B. the sum of £1,000, upon having the repayment of the same, with interest after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned (*c*): NOW THIS INDENTURE WIT-

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Witnesseth.

(*b*) With respect to this recital, see supra, p. 207, n. (*b*); p. 209, n. (*c*); and p. 210, n. (*d*).

Recital of the contract for the loan.

(*c*) The recital of the contract for the loan is somewhat shorter than the usual form, which runs as follows:—

"AND WHEREAS the said A. B., having occasion for the sum of £1,000, hath applied to and requested the said C. D. to advance and lend him the same, which he the said C. D. hath agreed to do upon having the repayment of the said sum of £1,000, with interest for the same in the meantime, after the rate hereinafter mentioned, secured to him, the said C. D., his executors, administrators, and assigns, in manner hereinafter mentioned:"

There are other forms longer than this, and consisting of two distinct recitals, one mentioning the request and the other the willingness to comply with it; but, as the contract in the text states all that is essential, that, or a nearly similar form, is generally used in this collection. It is not very easy to see why it should be stated, that the mortgagor has occasion for the money, for if he chooses to borrow it without having occasion for it, it is quite the same to the mortgagee; and it appears superfluous to state to whom the repayment is to be secured, for repayment necessarily implies payment to the lender or his representatives. The common expression, that the loan is made at the request of the mortgagor, may well be spared, for his wish for the loan must

NESSETH (*d*), that, in pursuance of the said agreement, and in consideration of the sum of £1,000, at or immediately before the sealing and delivery of these presents, to the said A. B. paid by the said C. D., (the receipt of which said sum of £1,000, he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns for ever, by these presents), And pursuant to, and by force and virtue, and in exercise and in execution of the power or authority to him the said A. B. for this purpose given by the said indenture of the —— day of ——, and of every or any other power or authority in anywise enabling him in this behalf, he the said A. B. doth by this present deed or instrument in writing, sealed and delivered by him the said A. B. in the presence of the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by him the said A. B., direct, limit, and appoint that all and singular the hereditaments hereinafter particularly mentioned, and intended to be hereby released, with the appurtenances, shall henceforth go, remain, and be to the use of the said C. D., his heirs and assigns, for ever, subject, nevertheless, to the said several annuities, hereinbefore particularly mentioned, (so far as the same are charged thereon), and subject to the proviso for redemption hereinafter contained (*e*): AND THIS INDENTURE ALSO WITNESSETH,

MORTGAGE IN FEE.

Consideration.

Receipt.

Appointment to mortgagee.

---

obviously be inferred from his accepting it. It is quite enough to recite that the mortgagee has agreed to lend the money upon the intended security.

(*d*) As to the manner of exercising a power, and the structure of a deed of this nature, see supra, p. 211, n. (*e*), p. 212, notes (*f*) and (*g*).

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But there does not seem to be any thing gained by this more elaborate expression. The form sometimes found, of "subject to the proviso for redemption of the same premises hereinafter contained," is erroneous, as making "premises," and not "proviso," the substantive to which

MORTGAGE IN FEE.

that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm (*f*) unto the said C. D., (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. B., &c., *supra*, p. 198) and his heirs and assigns: THAT &c., [*parcels—general words*]: TO HAVE AND TO HOLD the said messuages, buildings, cottage, and hereditaments, and all and singular other the premises hereinbefore released, or expressed and intended so to be, (subject to the said several annuities of £4, £2, and £1, so far as the same are charged thereon), unto the said C. D., his heirs and assigns, to the use of the said C. D., his heirs and assigns, for ever, subject nevertheless to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said A. B. and the said C. D., and the true intent and meaning of them and of these presents is, that if the said A. B., his heirs, executors, administrators, or assigns, shall pay or cause to be paid to the said C. D., his executors, administrators, or assigns (*g*), the sum of £1,000, and the sum of £50 as and for one year's interest for the same, at the rate of £5 for

Witnesseth, release to mortgagee.

Parcels.

Habendum.

Proviso for redemption.

"hereinafter contained" refers. (See supra, p. 20). The proviso is always referred to as a proviso for redemption, although in fact it is now generally a proviso for reconveyance. (See infra, note (*i*), to this Precedent).

Operative words.

(*f*) With regard to the operative words employed, see supra, p. 196, n. (*i*). The word "alien" is never used in mortgages, because it is understood to mean an absolute parting with the whole estate. (Jacob's Law Dictionary, ALIENATION).

As to specifying the place and hour of payment.

(*g*) It was formerly customary to specify the place of payment, for when no place of payment is appointed, the money being a sum in gross, and collateral to the title of the land, the mortgagor must tender the money to the mortgagee personally, unless he be out of the realm; it would not be sufficient to tender it on the land, as in the case of a rent. (Co. Lit. 210. b.; Lit. sect. 340, 342). Sometimes, too, the hour was appointed. (Lit. sect. 342). But these precautions were chiefly intended to guard the mortgagor from the effect of the rigour with which the condition for redemption was construed at common law; and at the

MORTGAGE IN FEE.

£100 for a year, making together the sum of £1,050, in the parts, shares, and proportions following, namely, the sum of £25, being half a year's interest for the said sum of £1,000 at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £1,025, the residue thereof, being the whole of the said principal sum of £1,000, and another half-year's interest for the same at the rate aforesaid, on the —— day of —— then next following, which will be in the year ——, without any deduction or abatement whatsoever, (*h*) [out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, taxed, charged, assessed, or imposed, or to be taxed, charged, assessed, or imposed, on the said messuages, buildings, hereditaments, and premises, hereinbefore appointed and released, or expressed and intended so to be, or any of them, or upon

present day it is considered sufficient to name the day of payment without fixing the hour or place. It is seldom intended that the principal is to be paid on the day named in the condition, and no difficulty is usually experienced in finding the mortgagee when the money is paid on the day. The shape of the present proviso being that of a re-conveyance, and not of a condition for defeating the mortgagee's estate, precludes the danger of his estate being defeated by a tender, in his absence, at the place and time fixed, and equity would doubtless relieve, if necessary, against the consequences of such a manœuvre. Nothing is now gained by fixing the place and hour of payment, and the practice has been very properly discontinued.

To whom the mortgage-money should be made payable.

The mortgage-money and interest is always made payable to the mortgagee, his executors, administrators, or assigns; but if from inadvertence or ignorance it should be made payable to the mortgagee, his heirs, executors, administrators, or assigns, and the mortgagee die before the day of payment, the mortgagor may on that day pay either to the heirs or to the personal representatives; but if he do not pay on that day, he must pay to the personal representatives. (Co. Lit. 210. a.; *Thornborough* v. *Baker*, 3 Swanst. 628). Of course the money may be made payable to the heir. (Lit. sect. 339; Co. Lit. 210. a.)

(*h*) The words in brackets are not of much use, and are often omitted, Sometimes in lieu of them, the words "for or in respect of any taxes, rates, outgoings, matters, or things," are inserted between "abatement" and "whatsoever." See infra, Precedent LV.

MORTGAGE IN FEE.

the said sum of £1,050 or any part thereof, or upon the said C. D., his heirs, executors, administrators, or assigns, for, upon account, or in respect of the said messuages, buildings, hereditaments, and premises, or any of them, or of the said sum of £1,050, or any part thereof, by authority of Parliament, or otherwise howsoever], then and in such case he the said C. D., his heirs or assigns, shall and will at any time after such payment shall have been so made as aforesaid, upon the request and at the costs and charges of the said A. B., his heirs or assigns, re-convey the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, unto the said A. B., his heirs and assigns, or as he or they shall order and direct (*i*), free from all incumbrances what-

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Ancient and modern form of the proviso for redemption.

(*i*) The original form of mortgages was that of a conveyance, with a proviso or condition, either in the same or in a separate deed, for making the conveyance void on payment of the mortgage debt and interest at a given day. And hence the use of the terms "proviso for redemption," "equity of redemption," and the like phrases. (Coote on Mortgages, ch. 2). But this form was extremely objectionable on account of the strictness with which conditions are construed, and of the difficulty of preserving evidence of the payment of the mortgage-money on the exact day appointed. The money was seldom paid on the day appointed, and it became the practice to procure a re-conveyance from the mortgagee on all occasions, so as to render it certain that the legal estate had been again vested in the mortgagor. The proviso soon adapted itself to the new practice, and is at the present day in all mortgages in fee-simple, not a proviso for redemption, or for making void the estate of the mortgagee, but a proviso that after payment the mortgagee shall re-convey to the mortgagor, or as he shall direct. In mortgages of copyholds, and sometimes in mortgages for terms of years, the ancient form is still employed. (See the Precedents, infra; and see further, ante, Vol. 1. Art. MORTGAGES).

The words "or as he or they shall order or direct" are, perhaps, not very essential, as the person who had the right to redeem would, ipso facto, have the right to direct how the legal estate should be conveyed. (See supra, p. 101, n. (*d*)).

As to the revocation of an existing will by a new limitation of the equity of redemption.

It was formerly, and in respect of title is still a question of great interest, whether, when the estate before the mortgage stood limited to uses to bar dower, and the proviso was for a re-conveyance to the mortgagor, his heirs and assigns, or as he or they should direct, and the mortgagor *before* making the mortgage had made a will devising the estate, the devise was not revoked by the alteration of estate occasioned

MORTGAGE IN FEE.

soever, made, done, or committed by the said C. D., his heirs, executors, administrators, or assigns, or any of them, so as for the doing thereof the said C. D., his heirs, executors, administrators, or assigns, be not compelled or obliged to go or travel from the place or places of his or their, or any of their usual abode or dwelling (*j*): AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B., his heirs, executors, or administrators, shall and will pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, the aforesaid sum of £1,050 in the parts, shares, and proportions, and on or at the days and times in the aforesaid proviso mentioned or appointed for payment thereof, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents (*k*): AND IN CASE the said principal

Covenant for payment of the mortgage-money.

—and interest.

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by the proviso. The devise was of course revoked at law, and the question was, whether the proviso for redemption did not amount to a new limitation of the equitable estate, so as to revoke the devise in equity likewise. The point as respects the draftsman has been rendered of no practical importance by the stat. 1 Vict. c. 26, (see sect. 23), and therefore requires no discussion here; but it must, for some time to come, frequently occur in the investigation of title. The principal authorities on the matter are *Tickner* v. *Tickner*, cited 1 Wils. 309, 3 Atk. 742, 745, 750, Amb. 117; *Kenyon* v. *Sutton*, cited 2 Ves. Jun. 631; *Rawlins* v. *Burgis*, 2 Ves. & Bea. 382; *Ward* v. *Moore*, 4 Madd. 368; *Brain* v. *Brain*, 6 Madd. 221; *Bullin* v. *Fletcher*, 1 Keen, 369; S. C. 2 My. & Cra. 432, 1 Sugd. Pow. 368, 2 Sugd. Pow. 11.

(*j*) This last provision is not perhaps essential, but it is the usual form, and in some cases may be a protection to the mortgagee.

As to the covenant for payment of the money.

(*k*) If a man mortgage his estate without giving a bond, or entering into a covenant with the mortgagee, the mortgagee becomes a simple contract creditor of the mortgagor. If there be a bond or covenant, the mortgagee becomes a specialty creditor; if a warrant of attorney, on which judgment is entered up, a judgment creditor; but in all these cases it is the contract which determines the nature of the debt, and in all alike the mortgaged estate is merely to be regarded as a collateral security. (1 Bro. C. C. 464, 465). Now, a specialty creditor has many priorities and advantages over simple contract creditors; (2 Williams's

MORTGAGE IN FEE.

sum of £1,000, or any part thereof, shall not be paid at the time hereinbefore mentioned or appointed for

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Executors, 666; 1st edit); and therefore, all mortgage deeds contain a covenant for payment of the principal money and interest, so as to constitute the mortgagees creditors by specialty. A bond is sometimes taken in addition, but this seems altogether useless, and is discarded by the most approved practice of the present day. Perhaps the reason for taking bonds may have been, that, before the statute 1 Will. 4, c. 47, actions of covenant could not be sustained against the devisees of the covenantor; but if it were so, the reason has now ceased.

Inutility of a bond where there is also a covenant.

As to taking warrants of attorney.

Judgment creditors have certain priorities and advantages over specialty creditors; (2 Williams's Executors, 656, 1st edit.; *Berrington* v. *Evans*, 3 You. & Col. 384); but it is not the practice to take a warrant of attorney to enter up judgment against the mortgagor except in special cases. By the 6 Geo. 4, c. 16, s. 108, and the cases which have been decided on the construction of it, judgments entered up on warrants of attorney are rendered of little avail in cases of bankruptcy. (See Arch. Bank. Law, 119, 128, 6th edit.)

Covenant for payment of interest.

Unless it is intended that the principal money shall be actually paid on the day appointed, the subsequent part of this covenant should be always employed, so as to give the mortgagee the power of suing for the interest independently of the principal.

Suggestion as to the situation and frame of covenant.

It may be observed, that, although custom has established that the covenant for payment of the money shall follow the proviso for redemption, and shall be framed with a reference to the proviso, yet that it would be more convenient and more conformable to the nature of a modern mortgage, if the covenant were inserted as the first witnessing part of the deed, and were made perfect in itself, and the proviso for redemption were framed with a reference to the covenant. This would enable the pleader, in framing a declaration on the covenant, to avoid all mention of the mortgage, and would make the mortgage appear to be, as it really is, a collateral security for the debt.

As to the time and mode of payment after default.

If the mortgagor do not pay the principal money on the day appointed, he cannot afterwards compel the mortgagee to receive payment till after six calendar months' notice, unless the mortgagee has demanded it; (Ca. & Opin. Vol. 2, p. 51; *Sharpnell* v. *Blake*, 2 Eq. Ca. Abr. 603, pl. 34); and in order to stop the interest on the mortgage, the notice must be given, and tender made on the day the notice expires. (2 Ves. 372, 678; see, too, *Lutton* v. *Rodd*, 2 Cha. Ca. 206; *Gyles* v. *Hall*, 2 P. Wms. 378; *Austen* v. *Executors of Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9).

On a bill for foreclosure the mortgagor is entitled to six calendar months to redeem; (Coote on Mortgages, 599, 2nd edit.; *Sharpnell* v. *Blake*, ubi supra); and on a proper application the time will be enlarged.

MORTGAGE IN FEE.

the payment thereof, shall and will during so long as the said sum of £1,000, or any part thereof, shall remain due on the security of these presents, pay, or cause to be paid to the said C. D., his executors, administrators, or assigns, interest for the said sum of £1,000, or for so much thereof as for the time being shall remain unpaid, after the rate of £5 per cent. per annum, in equal half-yearly payments, on the —— day of ——, and the —— day of ——, in every year: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns (*l*), in manner following, (that

Covenants by mortgagor that power is in force.

(Coote 602; *Wakerell* v. *Delight*, 9 Ves. 36). But after the time has been enlarged, subsequent interest must be computed on the amount of principal, interest, and costs. (*Bruere* v. *Wharton*, 7 Sim. 483).

It is generally assumed in modern practice, that the mortgagor cannot compel the mortgagee to accept payment of the mortgage-money before the day of payment appointed in the proviso for redemption; that the proviso for redemption is, in fact, not merely a restriction on the mortgagee's right to foreclose, but is a substantive agreement between the parties fixing the time of payment: and there can be very little doubt that such is the construction which would now be put on the proviso. A different doctrine seems, however, formerly to have prevailed; (*Talbot* v. *Braddil*, 1 Vern. 183, 395); but the circumstances of that case and of the instance given in it are peculiar, and would hardly be deemed applicable to the case of an ordinary mortgage.

Covenant for payment of the money a personal covenant.

The covenant for payment of the mortgage-money is entered into with the mortgagee, his executors and administrators, and is of course a personal covenant, not running with the land. Thus, where a mortgagee for a term of years bequeathed the mortgage *debt* to A. B., and appointed him one of the executors, and the co-executor assented to the bequest, it was held, that A. B. could not maintain an action in his own name, because the covenant with the mortgagee was collateral, and was broken in his lifetime. (*Canham* v. *Rust*, 2 J. B. Moore, 164).

Covenants for title in mortgages.

(*l*) The covenants for title are entered into with the mortgagee, his heirs and assigns, and run with the land. They are obviously of very little use during the continuance of the mortgage, as the mortgagor, by bringing an action on them, could only recover his mortgage-money; and that he could more easily obtain by suing on the covenant for the payment of the money. But the covenants for title become valuable after a foreclosure, or after a sale under the power as they then stand, in lieu of the common covenants for title contained in purchase-deeds. They are,

MORTGAGE IN FEE.

is to say), that the said power or authority hereinbefore exercised by the said A. B., was well and effectually created, and that the same, at the sealing and delivery of these presents, is in full force and virtue, and in nowise suspended, extinguished, weakened, or become void: AND THAT he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to direct, limit, and appoint, and also to grant, release, and confirm all the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO THAT, if default shall be made in payment of the said sum of £1,050, or any part thereof, contrary to the aforesaid proviso and covenant for the payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said C. D., his heirs and assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, or any of them or any part thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof, to and for his or their own use and benefit, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., his heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having, or lawfully or equitably claiming, or to have, or lawfully or equitably claim, in or to the

—for right to appoint and convey.

—for quiet enjoyment after default.

indeed, more valuable than the common covenants, because they are absolute instead of being restricted; see supra, p. 201, n. (*q*); and as it has been considered, that the mortgagee after foreclosing, or a purchaser under a power of sale, ought not to have the benefit of absolute covenants, it has been proposed to insert in mortgages two sets of covenants, one absolute, for mortgage purposes, the other restricted, to take effect after foreclosure or sale. But, as this would much increase the length and expense of mortgage-deeds, it is probable that mortgagors will continue to prefer the existing practice.

said hereditaments and premises, or any of them, or any part or parts thereof: AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise, by the said A. B., his heirs, executors, administrators, or assigns, saved, defended, kept harmless and indemnified, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever, other than the said several annuities of £4, £2, and £1, so far as the same are charged thereon: AND MOREOVER, that he the said A. B. and his heirs, and all and every other persons and person whomsoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, (other than in respect of the said annuities, or some of them), of, in, or to the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will from time to time and at all times hereafter (*m*), upon the request of the said C. D., his heirs or assigns, but at the costs and charges of the said A. B., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, and assurances

MORTGAGE IN FEE.

—free from incumbrances;

—and for further assurance.

(*m*) The ancient shape of this covenant was, "And moreover that, *if default shall be made in payment of the aforesaid sum of £——, or of any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case,* he the said [mortgagor] &c., (as in the text), at all times *thereafter*, &c.," proceeding as in the text, with the omission of the words near the end, "in manner aforesaid, according to the true intent and meaning of these presents." But this form was objectionable, because it precluded the mortgagee from availing himself of the covenant till default had been made, although it might well happen that some act for further assurance might require to be done before default. Of course the mortgagor cannot, under the covenant for further assurance, be required to release his equity of redemption; (*Atkins* v. *Uton*, 1 Lord Raym. 36, Comb. 318); although it may deserve consideration whether he might not be compelled, as an act of further assurance, to confirm a foreclosure or a sale under the power.

Covenant for further assurance.

MORTGAGE IN FEE.

in the law whatsoever, for the further, better, more perfectly and absolutely appointing, granting, conveying, and assuring all the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said C. D., his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required: PROVIDED ALSO, and it is hereby agreed and declared between and by the said A. B. and the said C. D., and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B., his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof to and for his and their own use, until default shall be made in payment of the said sum of £1,050, or some part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said C. D., his heirs or assigns, or any other person or persons whomsoever, lawfully or equitably claiming, or to claim, by, from, or under him, them, or any of them (*n*): AND IT IS HEREBY further provided and declared, that if default shall be made in payment of the said sum of £1,000, or the interest thereon, or any part thereof respectively, at the times hereinbefore appointed for the payment of the same respectively, it shall be lawful for the said C. D., his executors, administrators, or assigns, at any time or times after such default shall have been so made, without any further consent on the

Proviso for quiet enjoyment by the mortgagor until default.

Power of sale.

Proviso for quiet enjoyment until default.

(*n*) The proviso for quiet enjoyment until default, coupled with the proviso for redemption, operates as a demise by the mortgagee to the mortgagor for the term given for payment. (*Powseley* v. *Blackman*, Cro. Jac. 659; 5 B. & Ald. 605, n. (*a*); *Wilkinson* v. *Hall*, 3 Bing. N. C. 508).

MORTGAGE IN FEE.

part of the said A. B., his heirs or assigns, to make sale (*o*) and dispose of the said messuages, buildings, and other hereditaments and premises, hereinbefore appointed and released, or expressed and intended so to be, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, with full power upon any such sale or sales to make any stipulations as to title or otherwise which he or they shall deem necessary, and also with full power to buy in the said premises, or any part or parts thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises, or any part or parts thereof, and to re-sell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby; and that for the purposes aforesaid, or any of them, it shall be lawful for the said C. D., his executors, administrators, or assigns, to make and execute, or cause to be made and executed, all such agreements, deeds, conveyances, and assurances, as he the said C. D., his executors, administrators, or assigns, shall think fit: AND IT IS HEREBY also agreed and declared that upon any sale or sales which shall be made under the power of sale, hereinbefore contained, by the executors or administrators of the said C. D., or by any other person or

On sale by the executors of the mortgagee, the heirs to join.

(*o*) As to the validity of a power of sale in a mortgage, see supra, p. 245, n. (*a*); and as to the shape of the power of sale, and the special authorities given by it, see supra, p. 290, notes (*a*) and (*b*); p. 291, n. (*d*); p. 95, n. (*a*); and see further, as to powers of sale in mortgages, the note at the end of this precedent. A mortgagee with a power of sale is, (subject to the payment of his mortgage debt), like any other mortgagee, a trustee for the mortgagor. Thus, he cannot purchase at a sale under the power. (*Downes* v. *Grazebrook*, 3 Mer. 200; *Ex parte Francis*, 1 Dea. & Chit. 274). If a mortgagor become bankrupt, and a mortgagee with a power of sale wish to bid at the sale, he must waive his power, and allow the estate to be sold in the usual way; supra, p. 417. (*Ex parte Davis*, 1 Mon. & Ayr. 82; 3 Dea. & Chit. 504). If, however, the mortgagee have purchased bonâ fide, though without leave, the purchase may be confirmed. (*Ex parte Ashley*, 1 Mon. & Ayr. 82; S. C. 3 Dea. & Chit. 510; *Ex parte Pedder*, 1 Mon. & Ayr. 327; 3 Dea. & Chit. 622).

Validity of power of sale.

Mortgagee a trustee for the mortgagor.

MORTGAGE IN FEE.

persons who may not be seised of the legal estate in the premises to be sold, the heirs of the said C. D., or any other person or persons in whom the legal estate of the same premises, or any part thereof, shall be vested, shall make such conveyances and assurances of the same, for the purpose of carrying the sale thereof into effect, as the person or persons by whom the sale shall be made shall direct: PROVIDED ALSO, and it is hereby agreed and declared, that the said C. D., his executors, administrators, or assigns, will not and shall not execute the power of sale hereinbefore contained, unless and until he or they shall have previously given a notice in writing to the said A. B., his heirs, executors, administrators, or assigns, to pay off the monies which for the time being shall be due on the security of these presents, or left a notice in writing to that effect at the office of ——, in ——, and default shall have been made in payment of such monies, or some part thereof, for the space of six calendar months, to be computed from the time of giving or leaving such notice, or unless and until some half-yearly payment of interest which shall become due on the security of these presents, or a part of some such half-yearly payment, shall have become in arrear for the space of three calendar months after the day on which the same shall become due: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers thereat shall not be bound to see or inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any money remains due on the security of these presents or otherwise, or as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers thereat, be deemed and taken to be within the aforesaid power in that behalf, and be valid and effectual accordingly, and the remedy of the said A. B., his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained shall be in damages only: AND IT IS HEREBY

Power of sale not to be exercised till certain events happen.

Purchasers not to be bound to see that the events have happened.

Mortgagee's re-

also agreed and declared, that upon any such sale as aforesaid, the receipt or receipts, in writing, of the said C. D., his executors, administrators, or assigns, for the purchase-money of the premises to be sold, shall be an effectual discharge or effectual discharges to the purchaser or purchasers for the money therein respectively expressed to be received, and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, or be answerable for any loss, mis-application, or non-application thereof: AND IT IS HEREBY further agreed and declared that the said C. D., his executors, administrators, and assigns, shall hold all and singular the monies which shall arise from any sale which shall be made in pursuance of the aforesaid power in that behalf upon the trusts following, (that is to say), upon trust in the first place, by, with, or out of the same monies to reimburse himself or themselves, or pay or discharge all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto, and in the next place upon trust to apply such monies in or towards satisfaction of all and singular the monies which for the time being shall be due on the security of these presents, and then upon trust to pay the surplus (if any) of the said monies unto the said A. B., his heirs (*p*) or assigns, for his and their

Receipts for the purchase-money to be effectual.

Trusts of the purchase-money.

(*p*) The purchase-money should always be made payable to the mortgagor, his *heirs* or assigns, not to him, his executors, administrators, or assigns; for it is no part of the office of a mortgage to alter the character of the surplus, as between the heir and the personal representatives, which would be the effect of the supposed trust. (*Van* v. *Barnett*, 19 Ves. 102; *Wright* v. *Rose*, 2 Sim. & Stu. 323; see, too, *Biggs* v. *Andrews*, 5 Sim. 424). It is intended that the mortgagee shall pay himself his debt, and reconvey or pay over the surplus, be it land or money, to the person who has the right to redeem. It may be observed, that even if the ultimate trust be for the personal representatives, yet, that if the sale do not take place till after the death of the mortgagor, the surplus will go to the heir. (*Wright* v. *Rose*, ubi supra). Supposing the heir to die before the surplus is actually paid him, a question may arise between his real and personal representatives, but it is not the business of the mortgage to regulate equities of that nature. The remarks in

Surplus to be deemed real estate.

MORTGAGE IN FEE.

proper use and benefit: AND IT IS HEREBY also agreed and declared that the aforesaid power of sale shall and may be exercised by any person or persons, who for the time being shall be entitled to give a discharge for the monies which for the time being shall be due on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said C. D., his executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power or trusts, or any of them: PROVIDED ALSO, and it is hereby lastly agreed and declared, that the aforesaid power of sale or any thing herein contained, shall not in anywise prejudice or affect the right of the said C. D., his heirs, executors, administrators, or assigns, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being (*q*). IN WITNESS &c.

Power may be exercised by any one entitled to the purchase-money.

Mortgagee's indemnity clause.

Power not to prejudice the right of foreclosure.

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another part of this work on the cases of resulting trusts for the heir, in land directed by will to be converted, will perhaps be found applicable to the present question. (See *Jessop* v. *Watson*, 1 My. & Ke. 665).

If the ultimate trust were, as through ignorance or carelessness it sometimes is, made for the mortgagor, his heirs, executors, administrators, or assigns, it is apprehended that the heir would be entitled to the surplus; but, perhaps, the doctrine laid down in *Wright* v. *Rose*, ubi supra, would be followed.

Utility of power of sale.

(*q*) A power or trust for sale in default of payment of the debt is now made a part of every mortgage, unless the security be so ample, and the mortgagor in such circumstances, as to preclude all risk of any difficulty in obtaining re-payment. For it is no hardship to the mortgagor, if he cannot pay the debt, to have his estate sold, and the surplus produce handed over to him; and the mortgagee, if not armed with this remedy, is driven to the tedious and expensive resort of a suit for foreclosure. By the power of sale, too, the mortgagee gets money, whereas by a foreclosure he gets the land, which he seldom desires.

Modes of conferring the power of sale.

There are two ways of arming the mortgagee with a power of selling the estate; one (that in the text) by which the estate is conveyed to him on mortgage in the usual way, and the power of sale is subsequently attached; the other, that of a trust, that if the mortgagor pay the principal and interest at the times and in manner appointed, the mortgagee shall re-convey, and in default of such payment shall sell. The first form is much

MORTGAGE IN FEE.

to be preferred for many reasons; it is much more germane to the nature and shape of a mortgage, and is much more easily handled on transfers and other subsequent dealings. No example of the second form will be found in the present collection, because it is seldom used, and the space intended to be employed will not admit of the introduction of any other precedents than those which are well approved.

Power should be given to mortgagee himself.

Both a power and trust for sale may be given to a third person, but it is better that they should be reposed in the mortgagee, with such restrictions as may prevent his doing needless injury to the mortgagor. (See *Anon.* 6M add. 10), where the court restrained a trustee from selling when it would not have restrained the mortgagee himself.

On framing power of sale in mortgages.

A good mortgage power of sale should give the persons for the time being entitled to the mortgage money, full discretion to make the sale in such manner as they shall deem best. It should provide that the persons having the legal estate, if different from those entitled to the money, shall convey the estate as the persons entitled to the money shall direct. It should stipulate, as a matter of personal agreement between the mortgagor and mortgagee, that no sale shall be made until after due notice demanding payment of the principal, or until the interest shall be improperly in arrear, taking care, however, to protect purchasers from being bound to see to the propriety or regularity of the sale; and, lastly, should give to the mortgagee aud his personal representatives power to give effectual receipts for the purchase-monies, and should declare in clear language the trusts of these monies when received. The power in the text (from which the other powers in these precedents have been adapted in actual practice) was framed by an eminent conveyancer of the present day, and appears to combine in itself all the requisites for an effective power. The three last clauses are added, perhaps rather as a matter of precaution than as being essential.

The power should always in the first instance be given to the mortgagee, his executors, administrators, and assigns; not to the mortgagee, his heirs and assigns, for the heirs are in no wise interested in the money, and ought only to be the instruments of the personal representatives for effectuating a sale when made. The heirs, too, are often infants, which would render a sale impracticable. The word "assigns" should never be omitted, for if it be absent from the power of sale, even though it be found in the power to give receipts, a transferee of the mortgage could not exercise the power. (*Bradford* v. *Belfield*, 2 Sim. 264). Under a power to the mortgagor, his heirs or assigns, a devisee of the legal estate might undoubtedly exercise the power, though whether he could do so under a power to the mortgagor and his heirs is more doubtful. (See *Bradford* v. *Belfield*, ubi supra; *Roe* d. *Bamford* v. *Hayley*, 12 East, 464). But the surest way is to give the power to the personal representatives, and to declare that any person entitled to the mortgage-money may exercise the power of sale. As to the mode of conferring powers of sale where the mortgagees are more than one in number, see the next Precedent.

LIV.

TO PERSONS LENDING ON A JOINT ACCOUNT.

MORTGAGE *in* FEE *to* THREE *Persons who advance the Money on a* JOINT ACCOUNT (*a*). POWER *of* SALE. ATTORNMENT *by Mortgagor.*

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c. [*mortgagor*], of the one part, and C. D., of &c., E. F.

As to the survivorship in money lent by joint mortgagees.

(*a*) If two persons jointly advance money on mortgage, and one of them die, the debt will at law belong to the survivor; but in equity, the money advanced by the deceased lender will belong to his representatives. (3 Atk. 734; 2 Ves. sen. 258; 3 Ves. 631). The case of *Petty* v. *Styward*, (Rep. in Chan. 57; 1 Eq. Ca. Abr. 290), which is usually quoted as an authority for this doctrine, does not indeed appear to bear it out, for there there was an express declaration of trust between the mortgagees; but, independently of this case, the doctrine is perfectly established.

Mortgages by trustees.

When money is advanced by trustees, as the money belongs to them on a joint account, the rule of equity inferring a tenancy in common does not operate; but, as it is extremely improper and inexpedient to shew on the mortgage-deed that the money is trust money, so as to incumber the title of the estate with the deeds concerning the trust, the practice is, that the trustees shall lend the money as if it were absolutely their own, but with a declaration that it belongs to them on a joint account, so as to negative the equitable inference that the money belongs to the lenders as tenants in common. It was formerly usual to accomplish this object by a special proviso, (ante, Vol. 2, pp. 603, 606); but it is at present considered sufficient to state, that the monies lent belong to the lenders on a joint account. This will enable the survivors to give a discharge without the concurrence of the personal representatives of those who have died. The proviso and covenant for payment should make the money payable to the persons who are actually to give a receipt for it, *i. e.* to the lenders, or the survivors or survivor, or the executors or administrators of the survivor. The expression is usually, as a matter of precaution, repeated in the witnessing part of the deed. Some practitioners say, "on a joint account in equity as well as at law;" but the addition is needless. Of course, the actual interests in the money

of &c., and G. H. of &c. [*mortgagees*], of the other part: WHEREAS the said C. D., E. F., and G. H. have agreed to advance and lend to the said A. B. the sum of £1,000, out of monies belonging to them upon a joint account, upon having the repayment of the said sum of £1,000, with interest for the same at the rate of £5 per cent. per annum, secured in manner hereinafter mentioned: AND WHEREAS, as part of the said security, it was agreed that the said A. B. should attorn and become tenant to the said C. D., E. F., and G. H., in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursance of the said agreement, and in consideration of the sum of £1,000, at or immediately before the sealing and delivery of these presents paid to the said A. B. by the said C. D., E. F., and G. H., out of monies belonging to them on a joint account, (the receipt of which said sum of £—— he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said C. D., E. F., and G. H., and every of them, their and every of their heirs, executors, administrators, and assigns, for ever by these presents): He the said A. B. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said C. D., E. F., and G. H., (in their actual possession now being, &c., *supra, p.* 198,) and their heirs, ALL THAT, &c. [*general words*], TO HAVE AND TO HOLD the said —— and hereditaments, and all and singular other the premises hereinbefore released, or expressed and intended so to be, unto the said C. D., E. F., and G. H., their heirs and assigns, to the use of the said C. D., E. F., and G. H., their heirs and assigns, subject nevertheless to the proviso for redemption hereinafter contained, (that is to say (*b*)) [PROVIDED ALWAYS, and it

TO PERSONS LENDING ON A JOINT ACCOUNT.

Recital of agreement for mortgage.

—of agreement to attorn.

Witnesseth.

Consideration.

Receipt.

Operative words.

Parcels.

Habendum.

Proviso for redemption.

will be declared by a deed of even date, which will not be shewn to the mortgagor, or form part of the title of the estate.

(*b*) When there is but one witnessing part, so that the proviso for redemption is introduced with a "that is to say," the words in brackets

TO PERSONS LENDING ON A JOINT ACCOUNT.

is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of them and of these presents nevertheless is,] that if the said A. B., his heirs, executors, administrators, or assigns, shall pay or cause to be paid to the said C. D., E. F., and G. H., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £1,000, and the sum of £50, as and for one year's interest for the same, at the rate of £5 for £100 for a year, making together the sum of £1,050, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £25, being half a year's interest for the said sum of £1,000 at the rate aforesaid, on the —— day of ——, next ensuing the date of these presents, which will be in the year ——, and the sum of £1,025, residue thereof, being the whole of the said principal sum of £1,000, and another half-year's interest for the same at the rate aforesaid, on the —— day of —— then next following, which will be in the year ——, without any deduction or abatement whatsoever (*c*), [out of the same, or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, taxed, charged, assessed, or imposed, or to be taxed, charged, assessed, or imposed on the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or upon the said sum of £1,050, or any part thereof, or upon the said C. D., E. F., and G. H., or any of them, their or any of their heirs, executors, administrators, or assigns, for, upon account, or in respect of the said hereditaments and premises, or any of them, or of the said sum of £1,050, or any part thereof, by authority of Parliament, or otherwise howsoever, or for, upon account, or in respect of any other matter, cause, or

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may be omitted without impropriety. It is, however, more usual to retain them.

(*c*) As to the words in brackets, see supra, p. 467, n. (*b*).

thing whatsoever], then and in such case they, the said C. D., E. F., and G. H., or the survivors or survivor of them, or the heirs of such survivor, their or his assigns, shall and will, at any time after such payment shall have been so made as aforesaid, upon the request and at the costs and charges of the said A. B., his heirs or assigns, reconvey the said hereditaments and premises hereinbefore released, or expressed and intended so to be, unto the said A. B., his heirs and assigns, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said C. D., E. F., and G. H., or any of them, their or any of their heirs, executors, administrators, or assigns, so as, for the doing thereof, the said C. D., E. F., and G. H., or any of them, their or any of their heirs, executors, or administrators, be not compelled or obliged to go or travel from the place or places of his, their, or any of their usual abode or dwelling: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., E. F., and G. H., their executors and administrators, that he the said A. B., his heirs, executors, or administrators, shall and will pay, or cause to be paid, to the said C. D., E. F., and G. H., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the aforesaid sum of £1,050, in the parts, shares, and proportions, and on or at the days or times in the aforesaid proviso mentioned or appointed for payment thereof, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents: AND IN CASE the said principal sum of £1,000 shall not be paid at the time hereinbefore mentioned or appointed for payment thereof, shall and will, during so long as the said sum of £1,000, or any part thereof, shall remain due on the security of these presents, pay, or cause to be paid, to the said C. D., E. F., and G. H., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, interest for the said sum of £1,000, or for so much thereof as for the time being shall remain unpaid, after the rate of £5

TO PERSONS LENDING ON A JOINT ACCOUNT.

Covenant for payment of the mortgage-money;

—and interest.

TO PERSONS LENDING ON A JOINT ACCOUNT.

per cent. per annum, by equal half-yearly payments, on the —— day of ——, and the —— day of —— in every year: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., E. F., and G. H., their heirs and assigns, by these presents in manner following, (that is to say), that he the said A. B., at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to, the said hereditaments and premises hereinbefore released, or expressed and intended so to be, and every part thereof, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee-simple, without any manner of condition, use, trust, property, power of revocation, or limitation of any use or uses, or any other restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, incumber, revoke, or make void the same; AND THAT he the said A. B. now hath in himself good right, full power, and absolute authority to grant, release, and confirm the said hereditaments and premises hereinbefore granted, released, and confirmed, or expressed and intended so to be, unto and to the use of the said C. D., E. F., and G. H., their heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO, THAT if default shall be made in payment of the said sum of £1,050, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said C. D., E. F., and G. H., their heirs or assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof, to and for his and their own use, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., his heirs or assigns, or any other person or persons whatsoever, any estate, right, title, or inter-

Covenants for title.

—for right to convey.

—for quiet enjoyment after default.

est, having, or lawfully or equitably claiming, or to have, or lawfully or equitably claim, in or to the said hereditaments and premises, or any of them, or any part or parts thereof; AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise, by the said A. B., his heirs, executors, or administrators, saved, protected, kept harmless, and indemnified, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever: AND MOREOVER, THAT he the said A. B. and his heirs, and all and every other persons and person whomsoever having, or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or interest of, in, or to the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time and at all times hereafter, upon the request of the said C. D., E. F., and G. H., or the survivors or survivor of them, or the heirs of such survivor, their or his assigns, but at the costs and charges of the said A. B., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying, and assuring all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, unto and to the use of the said C. D., E. F., and G. H., their heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said C. D., E. F., and G. H., or the survivors or survivor of them, or the heirs of such survivor, their or his assigns, or their or his counsel in the law, shall be reasonably devised, or advised and required: PROVIDED ALWAYS, and it is hereby further agreed and declared between and by the parties to these presents, that, after a sale and conveyance shall have been made, in pursuance of the power of sale hereinafter contained, of the said hereditaments and premises, or any of them, the costs

TO PERSONS LENDING ON A JOINT ACCOUNT.

—free from incumbrances.

—for further assurance.

Costs of further assurance after sale to be borne by persons requiring the same.

TO PERSONS LENDING ON A JOINT ACCOUNT.

and charges of any further assurances which shall, in pursuance of the covenant hereinbefore contained for further assurance, be required to be made of the hereditaments and premises which shall have been so sold and conveyed, or any of them, shall be borne and paid by the person or persons requiring the same (*d*): PROVIDED ALSO, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B., his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £1,050, or some part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said C. D., E. F., and G. H., or any of them, their or any of their heirs or assigns, or any other person or persons whomsoever, lawfully claiming or to claim by, from, or under them, or any of them: AND IT IS HEREBY further provided and declared between and by the parties to these presents, that if default shall be made in payment of the said principal sum of £1,000, or the interest thereof, or any part thereof respectively, at the times hereinbefore appointed for the payment of the same respectively, it shall be lawful for the said C. D., E. F., and G. H., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns (*e*), at any time or

Proviso for quiet enjoyment by the mortgagor until default.

Power of sale.

(*d*) This proviso is sometimes inserted in mortgages containing powers of sale, and has therefore been allowed to remain in the text. But there cannot be much doubt that it expresses nothing more than the general equitable doctrine on the subject. See supra, p. 473, n. (*m*).

Mode of reserving powers of sale to two or more mortgagees.

(*e*) With respect to the general frame of powers of sale in mortgages, see supra, pp. 477, 478, notes (*p*) and (*q*). When the mortgagees are more than one in number, the power should still be given, in such manner as to

TO PERSONS LENDING ON A JOINT ACCOUNT.

times after such default shall have been so made, without any further consent on the part of the said A. B., his heirs or assigns, to make sale and dispose of the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, with full power upon any such sale or sales to make any stipulations as to title or otherwise, which they or he shall deem necessary, and also with full power to buy in the same premises, or any part or parts thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises, or any part thereof, and to resell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby; And that for the purposes aforesaid, or any of them, it shall be lawful for the said C. D., E. F., and G. H., and the survivors and survivor of them, and the executors or administrators of such survivor, their or his assigns, to make and execute, or cause to be made and executed, all such agreements, deeds, conveyances, and assurances, as they or he shall think fit: AND IT IS HEREBY also

On sale, made

accompany the right to receive the money, *i. e.* "to the mortgagees or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns." The words, "their or his assigns" are essential in mortgages, because they contain no clauses like trustee clauses for carrying the power to the owners for the time being of the interest. (See supra, p. 291, n. (*c*)). The common expression, "the survivors or survivor of them, or the executors, administrators, or assigns of such survivor," should be carefully avoided; for it is apprehended, that if the power be so given, no transferee of the mortgage can exercise the power unless he be literally an assign of the survivor. The consequence is certainly absurd, viz. that an assign of the survivor may exercise a power which an assign of all the mortgagees cannot exercise; but the courts of equity have shewn so strong a disposition to construe clauses of this nature literally, that it would be unsafe for a purchaser to accept a conveyance from a transferee who was not actually the assign of the survivor. (See *Cole* v. *Wade*, 16 Ves. 27; *Townsend* v. *Wilson*, 1 B. & Ald. 608; *Hall* v. *Dewes*, Jac. 189; *Bradford* v. *Belfield*, 2 Sim. 264).

TO PERSONS LENDING ON A JOINT ACCOUNT.

by personal representatives, the persons having the legal estate to join.

agreed and declared, that upon any sale or sales which shall be made under the power of sale hereinbefore contained by the executors or administrators of the survivor of them, the said C. D., E. F., and G. H., or by any other person or persons who may not be seised of the legal estate in the premises to be sold, the heirs of the said survivor, or any other person or persons in whom the legal estate of the same premises, or any part thereof, shall be vested, shall make such conveyances and assurances of the same, for the purpose of carrying the sale thereof into effect, as the person or persons by whom the sale shall be made shall direct: PROVIDED ALSO, and it is hereby agreed and declared, that the said C. D., E. F., and G. H., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, will not and shall not execute the power of sale hereinbefore contained, unless and until they or he shall have previously given a notice in writing to the said A. B., his heirs, executors, administrators, or assigns, to pay off the monies which for the time being shall be due on the security of these presents, or left a notice in writing to that effect at the office of ——, in ——, and default shall have been made in payment of such monies, or some part thereof, for the space of six calendar months (*f*), to be computed from the time of giving or leaving such notice, or unless and until some half-yearly payment of interest which shall become due on the security of

Power not to be exercised till certain events shall happen.

Month—whether lunar or calendar.

(*f*) A month in law is a lunar month, or twenty-eight days, unless otherwise expressed. (2 Blackst. Comm. 143; *Lacon* v. *Hooper*, 6 T.R. 224; and see the cases cited, 1 C. P. Cooper, 384, n.). But, in mortgage transactions, a month means a calendar month: it has been so decided in the cases of a foreclosure; (*Anon.* Barnardiston, C. C. 324; 2 Eq. Ca. Abr. 605); and of an agreement not to pay off mortgage-money without six months' notice; (*Dyer* v. *Sweeting*, Willes, 588); and the same rule would probably be applied to any other computation of time relating to mortgages. For the practice is so established to make the period of redemption one year, with half-yearly payments of interest, that a lunar computation of months would be inconvenient, even if not impracticable. However, the practice of conveyancers is always to specify calendar months, as well in mortgages as in other instruments.

these presents, or a part of some such half-yearly payment, shall have become in arrear for the space of three calendar months after the day on which the same shall become due; PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers thereat shall not be bound to see or inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any money remains due on the security of these presents, or otherwise as to the propriety or regularity of such sale, and notwithstanding any irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers thereat, be deemed and taken to be within the aforesaid power in that behalf, and to be valid and effectual accordingly; and the remedy of the said A. B., his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, shall be in damages only; AND IT IS HEREBY also agreed and declared, that, upon any such sale as aforesaid, the receipt or receipts in writing of the said C. D., E. F., and G. H., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, for the purchase-money of the premises to be sold, shall be an effectual discharge or effectual discharges to the purchaser or purchasers for the money therein respectively expressed to be received, and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, or be answerable for any loss, mis-application, or non-application thereof: AND IT IS HEREBY further agreed and declared, that the said C. D., E. F., and G. H., or the survivors and survivor of them, or the executors or administrators of such survivor, their or his assigns, shall hold all and singular the monies which shall arise from any sale which shall be made in pursuance of the aforesaid power in that behalf, upon the trusts following, (that is to say), Upon trust, in the first place, by, with, or out of the same monies, to reimburse

TO PERSONS LENDING ON A JOINT ACCOUNT.

Purchasers not to be bound to see that such events have happened.

Receipts of mortgagees to be discharges.

Trusts of purchase-money.

TO PERSONS LENDING ON A JOINT ACCOUNT.

themselves or himself, or pay or discharge all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto; And, in the next place, upon trust, to apply such monies in or towards satisfaction of all and singular the monies which for the time being shall be due on the security of these presents; And then upon trust to pay the surplus (if any) of the said monies unto the said A. B., his heirs or assigns, for his and their proper use and benefit; AND IT IS HEREBY also agreed and declared, that the aforesaid power of sale shall and may be exercised by any person or persons who for the time being shall be entitled to receive and give a discharge for the monies which for the time being shall be due on the security of these presents; PROVIDED ALWAYS, and it is hereby agreed and declared, that the said C. D., E. F., and G. H., or any of them, their or any of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power and trusts, or any of them: PROVIDED ALSO, and it is hereby lastly agreed and declared, that the aforesaid power of sale, or anything herein contained, shall not in anywise prejudice or affect the right of the said C. D., E. F., and G. H., their heirs, executors, administrators, or assigns, or any of them, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being. AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement in this behalf, and for the considerations aforesaid, he the said A. B. hath attorned and become tenant, and by these presents doth attorn and become tenant from year to year to the said C. D., E. F., and G. H., their heirs and assigns, for and in respect of the said capital messuage or tenement, with its outbuildings and other appurtenances, and the several pieces of land situate in ——, containing in the whole —— acres, or thereabouts, and now held and occupied therewith by him the said A. B., at and under the yearly rent of £——, clear of all deductions, to be paid by

Power to be exercised by any person entitled to the purchase-money.

Mortgagee's indemnity clause.

Right of foreclosure not to be affected.

Witnesseth further attornment by the mortgagor.

TO PERSONS LENDING ON A JOINT ACCOUNT.

equal half-yearly payments, on the —— day of —— and the —— day of —— in every year, and the first half-yearly payment thereof to be made on the —— day of —— now next ensuing; And in testimony of such attornment, he the said A. B. hath this day paid to the said C. D., E. F., and G. H., the sum of one shilling each: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that if the said A. B., his heirs, executors, administrators, or assigns, shall make default in payment of the said principal sum of £1,000, or the interest thereon, or any part thereof respectively, on or at the days or times and in manner in the proviso and covenant hereinbefore contained, mentioned and appointed for payment thereof respectively, then, or at any time thereafter, it shall be lawful for the said C. D., E. F., and G. H., their heirs and assigns, upon giving fourteen days' previous notice upon the premises, of his or their intention so to do, to enter in and upon, and take possession of the said messuage, hereditaments, and premises whereof the said A. B. hath attorned tenant as aforesaid, and to determine and put an end to the tenancy created by the aforesaid attornment (*g*). IN WITNESS &c.

Proviso for determining the tenancy, on default in payment of mortgage-money or interest.

(*g*) By the old feudal law, the tenant's consent was necessary to an alienation of the seignory or reversion, and the expression of this consent was called an attornment. Till attornment the relation of lord and tenant did not subsist between the alienee of the seignory or reversion, and the tenant, and consequently the new lord could not distrain for rent or services. The necessity of attornment, however, was in a measure done away with by the statutes of uses and wills, and was almost entirely put an end to by the statutes of the 4th of Anne, c. 16, and 11 Geo. 2, c. 19. (See Co. Lit. 309. a. n. 1). Almost the only case in which an attornment is made in modern practice, is that of a mortgagor being in the actual possession of the lands mortgaged; for, as it does not seem altogether clear what is the relation subsisting between such a mortgagor and his mortgagee, it is not unusual to insert the form in the text, so as to enable the mortgagee to treat the mortgagor as his tenant, and to distrain for rent. For further information as to the nature of the relations subsisting between the mortgagor and mortgagee, see Coote on Mortgages, Book III. ch. 1, 2nd ed.; 2 Prest. Conv. 303. (*Hitchman* v. *Walton*, 4 Mees. & Wels. 409; and ante, Vol. 1. Art. MORTGAGES). Of course, if a receiver

Attornment by mortgagor in possession, to the mortgagee.

TO PERSONS LENDING ON A JOINT ACCOUNT.

be appointed the attornment must be to him, and if he be appointed by a separate deed the attornment should be made by that deed. The following or some similar words should also be inserted immediately before, "And in testimony":—

"which said yearly rent is to be received and applied by the said [*receiver*], upon and for the trusts, intents, and purposes hereinbefore mentioned and contained."

With regard to the relation and rights of the mortgagee and mortgagor towards tenants, see Coote on Mortgages, Book III. ch. 4, 2nd ed. (*Rogers* v. *Humphreys*, 4 Ad. & Ell. 299; *Waddilove* v. *Barnet*, 2 Bing. N. C. 538; Ex parte *Living* 1 Dea. 1; *Evans* v. *Elliott*, 1 Per. & Dav. 256; and ante, Vol. 1, Art. MORTGAGES.

Leases by mortgagor and mortgagee.

Neither the mortgagor nor the mortgagee alone can make a lease which will be binding on the other. (*Keech* v. *Hall*, 1 Doug. 22; *Hungerford* v. *Clay*, 9 Mod. 1; Coote on Mortgages, 2nd ed. pp. 406, 410, 442). And as the mortgagor is often desirous to be able to grant leases independently of the mortgagee, so as not to make public that the property is mortgaged, a power of leasing is occasionally given to the mortgagor by the mortgage deed. But this practice is not to be recommended, for the covenants by the lessee must then be entered into with the mortgagor, and will, consequently, be mere covenants in gross, and not available for the mortgagee and his assigns. (*Webb* v. *Russell*, 3 T. R. 323; *Stokes* v. *Russell*, Id. 378; *Russell* v. *Stokes*, 1 H. Bl. 362; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; S. C. 3 My. & Ke. 325). If a power of leasing be given to the mortgagor, it should provide that counterparts of the leases shall be executed by the lessees, and shall be deposited with the mortgagee, so that he may be informed of the terms of the tenancy. Sometimes a power of leasing is given to a mortgagee to be exercised when in possession, but it is so rare a thing for a mortgagee to take possession instead of selling or foreclosing, that it has not been deemed necessary to give any form of such a power. The following form is of a power given to the mortgagor of leasing for twenty-one years, and similar powers of granting building, or mining, or other leases, may be easily framed on the same plan.

Power of leasing.

"Provided also, and it is hereby agreed and declared between and by the parties to these presents, that it shall be lawful for the said [*mortgagor*], his heirs and assigns, from time to time and at all times hereafter, during the continuance of this present security, by any indenture or indentures to be sealed and delivered by him or them in the presence of, and attested by one or more credible witness or witnesses, to demise or lease, or limit or appoint by way

of demise or lease, all or any part or parts of the said hereditaments and premises, to any person or persons, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, so as there shall be reserved on every such demise or lease, or limitation or appointment, the best or most improved yearly rent or rents to be incident to the immediate reversion of the hereditaments so to be demised or leased, or limited or appointed, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or anything in the nature of a fine, premium, or foregift, for the making thereof, and so as there be contained in every such demise or lease, or limitation or appointment, a condition of re-entry for non-payment of the rent or rents thereby to be respectively reserved, and so as the lessee or lessees, appointee or appointees, do execute a counterpart thereof respectively, and do thereby covenant for the payment of the rent or rents thereby to be respectively reserved, and be not, by any clause or words therein to be contained, made dispunishable for committing waste, and so that every such counterpart be delivered to the said [*mortgagee*] within —— days after the execution thereof."

TO PERSONS LENDING ON A JOINT ACCOUNT.

LV.

MORTGAGE FOR A TIME CERTAIN.

MORTGAGE *in Fee by* APPOINTMENT, (SHORT FORM) (*a*). PROVISO *that the* MORTGAGE-MONEY *shall not be called in for a* CERTAIN TIME. ASSIGNMENT *of a* POLICY *of* FIRE INSURANCE *and* COVENANT *for Payment of* PREMIUMS.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., [*mortgagee*], of the other part: WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made or expressed to be made between [*parties*], the messuages and hereditaments hereinafter particularly mentioned, and intended to be hereby appointed, with their appurtenances, were conveyed and assured to the use of such person or persons, for such estate or estates, as the said A. B., by any deed or deeds sealed and delivered by him, in the presence of, and to be attested by, two or more credible witnesses, should direct, limit, or appoint, and in default thereof, to

Recital of creation of power.

Remarks on the language of the Precedent.

(*a*) It will be observed that this Precedent differs most materially in its language from the other forms in this collection, great care having been taken to cut off all redundancy of expression. But as the draft from which it was taken was settled by a most eminent conveyancer, and no really useful form or expression is omitted, the precedent may be relied on for practice with perfect safety. The form of the proviso for redemption, and of the covenants for title, may be recommended to attention. The proviso only names one day for payment of the principal and interest, leaving it to the covenant to provide for the half-yearly payment of interest if the principal be not paid on the day appointed. With regard to the propriety of shortening the covenants for title, see supra, p. 204. n. (*u*).

The provisoes as to the duration of the security are of the common length.

MORTGAGE FOR A TIME CERTAIN.

the use of, or in trust for, the said A. B., his heirs and assigns, as therein mentioned: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— to the said A. B. paid by the said C. D. at the execution of these presents, (the receipt of which said sum of £—— the said A. B. doth hereby acknowledge), and in exercise of the aforesaid power, and of every or any other power enabling him in this behalf, the said A. B. doth by these presents direct, limit, and appoint, that ALL THAT, &c. [*parcels—general words*], shall henceforth go and remain to the use of the said C. D., his heirs and assigns, subject to the proviso hereinafter contained (that is to say), that if the said A. B., his heirs, executors, administrators, or assigns, shall pay unto the said C. D., his executors, administrators, or assigns, the sum of £——, with interest for the same, at the rate of £—— for £100 for a year, on the —— day of ——(*b*) now next ensuing, without any deduction whatsoever for any present or future taxes or impositions, or any other matter, cause, or thing whatsoever, he the said C. D., his heirs or assigns, shall and will, at any time after such payment shall have been so made as aforesaid, upon the request and at the costs of the said A. B., his heirs or assigns, reconvey the said messuages, hereditaments, and premises unto the said A. B., his heirs and assigns: AND THE SAID A. B. doth hereby for himself, his executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B., his heirs, executors, or administrators, shall and will pay unto the said C. D., his executors, administrators, or assigns, the said sum of £——, and the interest thereon, on the day hereinbefore appointed for payment thereof, without any deduction or abatement whatsoever; and, in case the said sum of £ —— shall not be paid to the said C. D., his executors, administrators, or assigns, on the said —— day of —— next, shall and will

Witnesseth.

Consideration.

Receipt.

Appointment.

Parcels.

Proviso for redemption.

Covenant for payment of mortgage-money and interest.

(*b*) It will generally be convenient to make the day of redemption the day of the expiration of six calendar months from the date of the mortgage; as this course will best agree with the intended half-yearly payments of interest.

Day of redemption.

MORTGAGE FOR A TIME CERTAIN.

thenceforth, during the continuance of the security intended to be hereby made, pay unto the said C. D., his executors, administrators, or assigns interest, after the rate aforesaid, for the said sum of £——, or for so much thereof as shall for the time being remain unpaid, by equal half-yearly payments, on the —— day of ——, and the —— day of ——, in every year: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that he the said A. B. now hath full power to appoint the said hereditaments and premises to the use of the said A. B., his heirs and assigns, in manner aforesaid, and free from all charges and incumbrances whatsoever; and that the said A. B., and his heirs, and all other persons having, or lawfully or equitably claiming, any estate, right, title, or interest, in or to the said premises, or any part thereof, shall and will at all times hereafter, upon the request of the said C. D., his heirs or assigns, but at the costs of the said A. B., his heirs, executors, or administrators, do and execute, or cause and procure to be done and executed, all such further acts and assurances for more effectually assuring all the said hereditaments and premises unto the said C. D., his heirs and assigns, in manner aforesaid, as the said C. D., his heirs or assigns, shall reasonably require: PROVIDED ALWAYS that it shall be lawful for the said A. B., his heirs and assigns, to hold, occupy, and enjoy the said hereditaments and premises, and receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £——, or the interest thereon, or some part thereof respectively, without any interruption from the said C. D., his heirs or assigns: PROVIDED ALWAYS, and the said C. D. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., his heirs, executors, administrators, and assigns, that if the said A. B., his heirs, executors, administrators, or assigns, shall half-yearly, on every —— day of ——, and —— day of ——, until the —— day of ——, 18—, or within one calendar month next after each of the said days respectively, pay to the said A. B., his executors, adminis-

Covenants for right to appoint;

—and for further assurance.

Proviso for quiet enjoyment by the mortgagor until default.

Proviso that mortgagee shall not call for payment for a time certain;

trators, or assigns, interest for the said sum of £—— at the rate aforesaid up to the same half-yearly days of payment respectively, and shall and do perform, observe, and fulfil all and every the covenants hereinafter contained, then and in such case, he the said C. D., his executors, administrators, or assigns, shall not nor will, before the said —— day of ——, 18—, call in or compel payment of the said principal sum of £——, or any part thereof, or use or take any ways or means or proceedings whatsoever for obtaining the possession or the receipt of the rents, issues, and profits of the said hereditaments and premises, or any part or parts thereof(c): PROVIDED ALSO, and it is hereby

MORTGAGE FOR A TIME CERTAIN.

—or be compelled to accept payment.

(c) The proviso in the text operates as a demise from the mortgagee to the mortgagor, for the term specified. (*Wilkinson* v. *Hall*, 3 Bing. N.C. 508; see, too, *Powseley* v. *Blackman*, Cro. Jac. 659; 5 B. & Ald. 605).

Effect of making the loan for a term.

But if before the expiration of the term the mortgagor become bankrupt, the estate may be sold by order of the Court of Bankruptcy. (*Ex parte Bignold*, 1 Dea. 151). Of course the power of sale (if there be one in the mortgage) should be worded so as to be exerciseable in the usual way. See *Ex parte Bignold*, (1 Dea. 151, 156), where, however, the power is not set forth. The power of sale ordinarily used in these precedents may be employed in mortgages of this description withoutalteration. The provision in the text, as to the observance of covenants, relates to those for insurance. The following proviso is sometimes introduced: (See *Stanhope* v. *Manners*, 2 Eden 197):—

Additional proviso.

" Provided always, and it is hereby further agreed and declared, that if at any time or times, whilst the said principal sum o f£—— shall continue on this present security, the interest thereon shall be in arrear and unpaid for one calendar month and upwards next after any day whereon half a year's interest shall become due or payable, and the interest being so in arrear, the said [*mortgagee*], his executors, administrators, or assigns, shall neglect or forbear to call in, or compel payment of the said sum of £——, or shall accept interest for the same, then and in such case the said [*mortgagee*], his heirs, executors, administrators, or assigns, shall not thereby be prevented or precluded from calling in or compelling payment of the said sum of £——, or the interest thereon, at any time before the said —— day of ——, [*the last day of the term*], or from using or taking,

MORTGAGE FOR A TIME CERTAIN.

further agreed and declared, that it shall not be lawful for the said A. B., his heirs, executors, administrators, or assigns, at any time before the said —— day of ——, 18—, to oblige or compel the said C. D., his executors, administrators, or assigns, to receive the said sum of £——, or any part thereof: AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, the said A. B. hath assigned, and by these presents doth assign, unto the said C. D., his executors, administrators, and assigns, ALL THAT POLICY of insurance of the —— fire insurance office, numbered ——, and dated ——, whereby the said messuages and buildings are insured against loss or damage by fire in the sum of £——, and the full benefit and advantage of the said policy of insurance, and all monies to become payable by virtue thereof, TO HOLD AND RECEIVE the same unto the said C. D., his executors, administrators, and assigns, but subject to the same right or equity of redemption as for the time being shall be subsisting in the said messuages hereinbefore appointed: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, that he the said A. B., his heirs, executors, or administrators, shall and will, during the continuance of this security, pay, or cause to be paid, such annual premiums and duty, and other sum or sums of money, (if any), as shall become payable, in order to keep on foot the said policy of insurance; and that, in default thereof, it shall be lawful for the said C. D., his executors, administrators, or assigns, at any time or times, to pay any annual premium or premiums and duty, or other sum or sums of money, for keeping the said policy of insurance on foot, or otherwise for keeping the said messuages

Assignment of policy of insurance.

Habendum.

Covenant for payment of premiums and duty.

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before the said —— day of ——, any ways, means, or proceedings for obtaining the possession or the receipt of the rents, issues, and profits of the said hereditaments and premises, or any part thereof."

Perhaps a clause similar to the foregoing ought to be inserted in regard to the observance of the covenants.

MORTGAGE FOR A TIME CERTAIN.

and buildings insured against loss or damage by fire, in any sum or sums of money not exceeding the sum of £——, and that he the said A. B. shall and will, from time to time, on demand, pay unto the said C. D., his executors, administrators, or assigns, such sum or sums of money as he or they shall pay or advance for any of the purposes aforesaid, with interest for the same after the rate aforesaid; and that in the meantime the same with interest as aforesaid shall be and remain charged upon the said hereditaments hereinbefore appointed, and the same shall not be redeemable until full payment thereof respectively, as well as of the said sum of £——, and the interest thereon. IN WITNESS &c. (*d*).

(*d*) If the mortgaged property, or a substantial part of it, consist of buildings, a provision for insurance against fire is an essential part of the security. If there be an existing policy, it may be assigned, and a notice of the change of interest given to the insurance office; but if it be necessary to effect an insurance for the purpose of the mortgage, it will be more convenient to make the insurance in the name of the mortgagee. In either case the policy and the receipts for the premiums should be given up to the mortgagee. See the provisions made for these matters in the more perfect covenants given in a subsequent Precedent.

Law relating to insurance against fire.

It is to be remembered that a policy of insurance against loss by fire is not assignable without the consent of the insurance office. (*Saddlers' Company* v. *Badcock*, 2 Atk. 557; *Lynch* v. *Dalzell*, 4 Bro. P. C. 431). And therefore, whenever such a policy is assigned, the consent of the office (which is usually signified by indorsement on the policy) must be obtained. By the regulations of the Hand in Hand Insurance office, the benefit of a policy survives to the executors and administrators of the insured, and therefore, if the house be burnt subsequent to his death, his heir takes no benefit from the policy. (*Mildmay* v. *Folgham*, 3 Ves. 471). But this case was decided on the peculiar laws of the office in question, and it is doubtful whether as a general rule the heir would not be entitled to the benefit of the policy. (See Park on Insurance, 662, 7th ed.)

In a more recent case, where A. and B. were successive tenants for life of some houses, with remainder to A. in fee, A. having insured the houses, and they having been burnt down, he received the money and invested it in his own name in the funds, and did not rebuild the houses. A. then made his will and devised the estate to C., and his personalty to B., and B. in his will noticed the fund as forming part of the real estate of A., and did not specifically dispose of it. It was held that the insurance money, which remained unapplied, passed to C. as part of the real estate;

LVI.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

MORTGAGE *by* CO-PARTNERS *of a* COTTON-MILL *and* MACHINERY (*a*) *to a* JOINT STOCK BANK *for securing an* ACCOUNT CURRENT.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B. and C. D., of &c., cotton-spinners and co-partners [*mortgagors*],

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but that he had no claim on a part of it which had been applied in rebuilding another house which had also been burnt down on the same estate. (*Norris* v. *Harrison*, 2 Madd. 268). Where a partner left certain chattels in the order and disposition of the partnership, but insured them in his own name, and they were burnt, and afterwards a commission of bankruptcy issued against the partnership, it was held that the insurance money did not pass to the assignees. (*Ex parte Smith*, 3 Madd. 63; S. C. Buck, 149).

If property which has been insured against loss by fire be burnt under such circumstances as to render the hundred liable to make good the loss, the hundred is not discharged by the fact of the insured having received compensation from the office. (*Clark* v. *The Inhabitants of Blything*, 2 B. & C. 254). And the office, having paid the money, may sue the hundred in the name of the insurer. (*Mason* v. *Sainsbury*, 2 Marshall on Insurance, p. 796).

Reputed ownership of personal chattels.

(*a*) Personal property passes by delivery of possession, and it is possession which determines the apparent ownership. If, therefore, a purchaser or mortgagee of personal chattels do not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner, such purchaser or mortgagee cannot make a title as against a subsequent purchaser or mortgagee who takes possession, or against a creditor who seizes the chattels under an execution, or against the assignees in bankruptcy of the vendor or mortgagor. (*Twyne's Case*, 3 Rep. 80; *Ryall* v. *Rowles*, 1 Atk. 165; 1 Ves. 348; *Lingham* v. *Biggs*, 1 Bos. & Pul. 82; *Bryson* v. *Wylie*, Id. 83, n.; 9 East, 240; *Edwards* v. *Harben*, 2 T. R. 587). "For," says Sir Thomas Plumer, "if you, having the right to possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his

of the one part, and E. F., of &c., G. H., of &c., I. K. of &c., three of the directors of the —— bank, of &c.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you." (3 Russ. 22). And to prevent this consequence, a purchase or mortgage of personal chattels, of which possession can be given, is not allowed to be perfect till actual possession is taken. It must, however, be borne in mind, that this rule does not apply to the case of chattels, of which it would be practically impossible to take actual possession. Thus, where a man mortgaged land with a mill, described as being upon the land, and the mill was found not to be a fixture, so as to be of the nature of the land, still it was held that the mortgage was valid against a creditor of the mortgagor, who took the mill in execution, "for it was not to be expected that the mortgagee should come to reside in a mill." (*Steward* v. *Lombe*, 1 Brod. & Bing. 506; S. C. 4 J. B. Moore, 281). Whether the result would have been the same if the contest had been between the mortgagee and the assignees in bankruptcy of the mortgagor, is uncertain; for the right of the assignees depends, not so much on the general principle of law, as on the stat. 6 Geo. 4, c. 16, s. 72, which re-enacts in nearly the same words the former stat. 21 Jac. 1, c. 19, s. 11, on the same subject. By the stat. 6 Geo. 4, c. 16, s. 72, it is enacted, "that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioner shall have power to sell and dispose of the same for the benefit of the creditors under the commission (fiat)." And therefore, in contests with assignees, the point of dispute is, whether the chattels in question were at the date of the bankruptcy in the possession, order, or disposition, or in the reputed ownership of the bankrupt, so as to enable him thereby to obtain credit. (Arch. Bank. Law, 186; 6th ed.).

Mortgages of machinery.

With regard to mills and manufactories, it often happens that the mere land and buildings are of small value, while the engines, machinery, and utensils are extremely valuable; and hence the power of the owner to raise money on mortgage of his property depends on the question, whether he can make a mortgage of the engines, machinery, and utensils, which will be valid both against his execution creditors and his assignees in bankruptcy. And as this is a subject of the highest importance, it is proposed to refer to the principal points which have been decided concerning it.

Fixtures are not goods and chattels.

It is clear, that all engines, machinery, and utensils, which are affixed to the freehold, may be effectually mortgaged, although the mortgagor retain the actual possession of them; for they partake, not so much of the nature of chattels, as of the land to which they are fixed. Thus, where

—and do not

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

[*mortgagees*], of the other part; [*recites indentures of lease and appointment, and release of the third and fourth days*

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pass to assignees in bankruptcy as such.

certain premises were demised, together with the stills, vats, and utensils specified in a schedule, and an option to purchase was given to the lessees, and the lessees became bankrupt, it was held, that the stills, being fixed to the freehold, did not pass to the assignees, but that the vats and other utensils, which were not so fixed, did pass. (*Horn* v. *Baker*, 9 East, 215). In a subsequent case, the lessees of a mill and iron-forge, who had purchased the machinery, utensils, and implements, subject to a power in the lessor of repurchasing at the end of the term, made a mortgage of the lease, machinery, utensils, and implements, and then became bankrupt. It was held, that the moveable articles belonged to the assignees, but that the fixtures passed to the mortgagee. (*Clark* v. *Crownshaw*, 3 B. & Ad. 804). In another case, an owner in fee-simple mortgaged a cotton-mill and other buildings, "with the steam-engine and engine-house, boilers, and boiler-houses," and became bankrupt. It was proved, that the boilers, and the entablature plate, spring-beams, and wall-plates of the engine were affixed to the freehold, but that every other part of the engine and machinery was attached only by bolts and screws, and it was therefore held, that the boilers, entablature plate, spring-beams, and wall-plates, passed by the mortgage, but that the rest of the machinery belonged to the mortgagees. (*Hubbard* v. *Bagshaw*, 4 Sim. 326). It will be observed, that the steam-engine simply, and not the other machinery, was mentioned in this mortgage. (See *Steward* v. *Lombe*, 1 B. & B. 506).

In one case, in which the circumstances were extremely special, it was held, that machinery affixed to the freehold did not pass in a mortgage of the freehold. (*Trappe* v. *Harter*, 2 Cro. & Mee. 153). But in that case, (as in *Hubbard* v. *Bagshaw*, ubi supra), the machinery in question was attached to the freehold only by bolts and screws; and it was very doubtful whether the description in the mortgage-deed comprised any thing more than a steam-engine and the machinery immediately connected with it. It appeared, moreover, that the machinery, both before and after the mortgage, and with the privity of the mortgagee, had been valued separately from the land and buildings, and that, according to the custom of the country where the property was situated, machinery was constantly sold distinctly from the freehold. Under these circumstances *Trapper* v. *Harter* cannot be considered as invalidating the general rule; but both that case, and the other cases on the subject, (especially *Hubbard* v. *Bagshaw*, and *Steward* v. *Lombe*, ubi supra), may suggest to the draftsman the propriety of specifying in the mortgage, or in a schedule to it, the machinery or the class of machinery which it is intended to comprise. It is not, however, meant to contend, that machinery affixed by bolts and screws only would go to the mortgagee as against

Machinery intended to be mortgaged ought to be specified.

of May, 1837, *whereby two pieces of land were conveyed and assured to the use of the said A. B. and C. D., their heirs*

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

the assignees in bankruptcy even if it were specified, but it is not certain that such might not be the case, and it is, at any rate clear that the actual specification in a mortgage of chattels of this nature protects them against an execution creditor. (*Steward* v. *Lombe*, 1 Brod. & Bing. 506). And where two houses and an iron foundery were mortgaged, and the fixtures in the dwelling-houses were mentioned, but not the machinery and fixtures in the foundery, it was held, that, although the machinery and fixtures in the foundery would have passed if no mention had been made of fixtures, yet that the specific mention of those in the dwelling-houses prevented the passing of those in the foundery. (*Hare* v. *Horton*, 5 B. & Ad. 715). The propriety of this decision may be questioned; but at any rate it inculcates the necessity of specifying fully and accurately what is intended to pass.

Effect of custom of country or trade.

In considering the question, whether machinery, which has been leased or mortgaged, passes to the assignees in bankruptcy of the mortgagor, as being in his order and disposition, or reputed ownership, at the time of the bankruptcy, the custom of the country where the premises are situated, or of the trade in which they are employed, is very material. For it is obvious, that if from custom the possession of a certain class of chattels does not imply the ownership of them, the possessor does not obtain a false credit by being in possession. Thus, where iron works were mortgaged (*eo nomine*), (but without any specification of machinery, except steam-engines, furnaces, and mills), by the fee-simple owner, and it was proved to be the custom of the country, that when iron-works were *let*, the machinery should be furnished by and should continue to be the property of the *lessor*, it was held, that the machinery passed to the mortgagee. (*Rufford* v. *Bishop*, 5 Russ. 346, 354; *Storer* v. *Hunter*, 3 B. & C. 368). But, an opposite conclusion seems to have been drawn under similar circumstances in *Trappes* v. *Harter*, ubi supra, although that case was more particularly decided on other grounds, (see observations, supra). In all the other cases, however, evidence of a custom, that the possession of the machinery did not infer the ownership of it, has been held to be in favour of the mortgagee or lessor against the assignees in bankruptcy. (*Horn* v. *Baker*, 9 East, 215; *Clark* v. *Crownshaw*, 3 B. & Ad. 804; *Watson* v. *Peache*, 1 Bing. N. C. 327; see, too, *Hubbard* v. *Bagshaw*, 4 Sim. 326. But proof of a custom to let old collieries furnished, and virgin collieries unfurnished, is fatal to the claim of a lessor to the furniture of a virgin colliery. (*Coombs* v. *Beaumont*, 5 B. & Ad. 72.

Law as to tenant's fixtures.

With regard to tenant's fixtures, as between mortgagees, assignees in bankruptcy, and execution creditors, the law is somewhat peculiar. For the right of a tenant is only to remove the fixtures during his term, and

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

and assigns. An indenture of feoffment of the 8th day of April, 1837, whereby another piece of land was conveyed and assured, and limited to such uses, &c., as the said A. B. and C. D. by deed should appoint, and in default of appointment to the use of the said A. B. and C. D., their heirs and assigns—and indentures of lease and release of the 14th and 15th days of June, 1838, whereby another close of land was conveyed and assured as to one moiety to the use of the said A. B. in fee, and as to the other moiety to the use of the said C. D. in fee:] AND WHEREAS the said A. B. and C. D. have entered into co-partnership as cotton-spinners, and intend to carry on the trade or business of cotton-spinners, under the firm or name of B. & D.: AND WHEREAS the said several pieces of land, hereditaments, and premises, comprised in the said several hereinbefore recited indentures, were purchased by the said A. B. and C. D., for the purposes of the said co-partnership, and were paid for out of monies belonging to them on their co-partnership account: AND WHEREAS the said A. B. and C. D. have lately erected and built a cotton-mill and an engine-house and other buildings connected therewith, on the pieces of land and hereditaments comprised in the said indentures of the 3rd and 4th days of May, 1837, and the 8th day of April, 1837, respectively, and have also affixed to, or placed upon, in, or about, or are now about to affix to, or place upon, in, or about the said premises, or some parts thereof, a steam

—of the formation of the partnership.

—and that the lands are partnership property.

—of the erection of the mill and machinery;

so to make them cease to be fixtures. (*Lyde* v. *Russell*, 1 B. & Ald. 394; *Penton* v. *Robart*, 2 East, 88). That right of the tenant enables an execution creditor to seize them, but does not make them goods and chattels within the bankrupt laws. Hence, both a mortgagee and an execution creditor can make a good title to tenant's fixtures against the assignees in bankruptcy of the tenant. (*Coombs* v. *Beaumont*, 5 B. & Ad. 72; 2 Nev. & Man. 235; *Boydell* v. *M'Michael*, 1 Cro. Mee. & Rosc. 177; *Minshall* v. *Lloyd*, 2 Mee. & Wels. 450). The question, whether a mortgagee, who had not taken possession, would have a good title as against an execution creditor, would probably depend on the fact, whether the fixtures were or were not specified in the mortgage. (*Steward* v. *Lombe*, 1 Brod. & Bing. 506; *Hare* v. *Horton*, 5 B. & Ad. 715).

engine and boilers, together with a large quantity of mill gear and mill-wright work, fixed and moveable machinery, and other things required to carry on the trade or business aforesaid: AND WHEREAS the said A. B. and C. D. have erected and built divers messuages or cottages for workmen and other buildings upon the said piece of land, hereditaments, and premises comprised in the said indentures of the 14th and 15th days of June, 1838: AND WHEREAS the said A. B. and C. D. have opened an account with the said bank of ——, for and in the name of the said firm of B. & D., and have requested the directors of the said bank to make advances or loans, and grant other accommodation on the said co-partnership account to them the said A. B. and C. D., or to the person or persons for the time being carrying on business in the name of the said firm of B. & D.: AND WHEREAS the said directors of the said bank have agreed to comply with the said request, upon having the re-payment of all such sums as shall in manner hereinafter mentioned become due or owing from the said A. B. and C. D., or the person or persons carrying on business in the name of the said firm of B. & D., or from any of them, their, or any of their executors or administrators, secured to the said bank in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, and for better securing to the said bank the re-payment of all such sums of money as shall or may at any time or times hereafter become due or owing to the said bank, in manner hereinafter mentioned, from the said A. B. and C. D., or the person or persons for the time being carrying on business in the name of the said firm of B. & D., or from any of them, their, or any of their executors or administrators, they the said A. B. and C. D. have, and each of them hath granted, released, assigned, and confirmed, and by these presents do and each of them doth grant, release, assign, and confirm, and also as to the said hereditaments and premises comprised in the said indenture of the 8th day of April, 1837, do, in pursuance of the power to them for this purpose given

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

—and cottages and other buildings.

—of the partners having requested advances from the bank.

—of the agreement for the security.

Witnesseth.

Consideration.

Conveyance and assignment.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

by the same indenture, and of every other power enabling them in this behalf, direct and appoint (*b*), unto the said E. F., G. H., and I. K., (the freehold parts thereof, in their actual possession now being by virtue of a bargain and sale thereof, to them made by the said A. B. and C. D., in consideration of five shillings a-piece, &c.; *supra*, p. 198), and their heirs, executors, administrators, and assigns, ALL THOSE the said pieces of parcels of land, hereditaments, and premises, comprised in the said several indentures of the 3rd and 4th days of May, 1837, the 8th day of April, 1837, and the 14th and 15th days of June, 1838, respectively, and hereinbefore particularly mentioned (*c*); AND ALSO all and singular the said mill, engine-house, messuages, or cottages and buildings, and all other erections and buildings, now standing and being upon the said lands, hereditaments, and premises, or any part thereof: AND ALSO all and singular the said steam-engine, boilers, mill-gear, mill-wright work, fixed and moveable machinery, implements, and utensils, now or hereafter to be fixed to or placed upon, or used in or about the said lands, hereditaments, mill, buildings and premises, or any of them, or any part thereof, (all of which steam-engine, boilers, mill-gear, mill-wright work, machinery, implements, and utensils, now fixed to or placed upon, or used in or about the said premises, are specified in the schedule to these presents) [*general words*]: TO HAVE AND TO HOLD the said pieces or parcels of land, mill, messuages, or cottages, buildings, steam-engine and boilers, and all such and such part and parts of the said

Parcels. Comprising lands,

mill, houses, buildings, &c.

—and engines and machinery.

Habendum of the freehold, and the premises affixed to the freehold;

Irregularity in form of conveyance.

(*b*) The form of conveyance in this precedent is irregular, in blending the appointment with the release (see supra, p. 212, n. (*g*)); but as the conveyance to the releasees is in fee-simple, no evil *effect* ensues, and the irregularity was permitted, in order to avoid lengthening the conveyance by another witnessing part.

Situation of parcels.

(*c*) It is improper as a general practice to place the parcels in the recitals (supra, p. 209, n. (*c*)); but in the precedent in the text, that course was rendered necessary by some peculiarities in the description of the property, which do not appear on the precedent, and by the expediency of stating in the recitals the erection of the mill and machinery on the different parts of the property described.

mill-gear, mill-wright work, machinery, and premises hereinbefore released and assigned, or expressed and intended so to be, as are affixed to the freehold, unto the said E. F., G. H., and I. K., their heirs and assigns, to the use of the said E. F., G. H., and I. K., their heirs and assigns, subject to the proviso for redemption hereinafter contained: AND TO HAVE AND TO HOLD all such and such part and parts of the said mill-gear, mill-wright work, machinery, and premises hereinbefore released and assigned, or expressed and intended so to be, as are not affixed to the freehold, unto the said E. F., G. H., and I. K., their executors, administrators, and assigns, subject to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that, if on demand in writing to be signed by the said E. F., G. H., and I. K., or any of them, or by any other director or directors for the time being, of the said bank, and to be left upon the premises hereby released, or expressed and intended so to be, or any part thereof, addressed to or for the said A. B. and C. D., or the person or persons for the time being carrying on or having carried on business in the name of the said firm of B. & D., or any of them, or their or any of their executors or administrators, or any person or persons entitled to redeem the premises hereby mortgaged, or any part thereof, or if at any time the said A. B. and C. D., or the person or persons for the time being carrying on, or having carried on business in the name of the said firm of B. & D., or any of them, their or any of their heirs, executors, administrators, or assigns, shall and do pay, or cause to be paid to any of the cashiers (*d*) for the time-being of the

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

—of the premises not affixed to the freehold.

Proviso for redemption.

(*d*) The money ought to be made payable to some person or persons empowered by the deed of settlement to give receipts which shall be binding on the shareholders. But it is apprehended that the deed of settlement will not form part of the title, and that a purchaser, either from the mortgagees or the mortgagors, will not be entitled to require its production. To discharge the estate as against the shareholders, it will suffice to shew that the money due to the bank has been paid to the persons who publicly appear as the agents of the company. For these companies are partnerships, whose ordinary business it is to lend money on

On the payment of money to joint stock companies.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

said bank, the balance which, on the account-current of the said firm of B. & D. with the said bank, shall, for the time-being, be due or owing for bills or notes discounted or paid, or other loans, credits, or advances made to or for the accommodation, or at the request of the said A. B. and C. D., or the person or persons for the time being carrying on business in the name of the said firm of B. & D., or for interest and commission, or other lawful charges and expenses, then and in such case the said E. F., G. H., and I. K., or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, shall and will at any time or times after such payment shall have been so made as aforesaid, upon the request and at the proper costs

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securities, and if they hold out certain persons to the world as their agents, a court will hold them bound by the acts of those agents, and will not look at the partnership-deed to see whether the agents were duly appointed.

In dealing with banking companies it will probably be sufficient to pay the money to a cashier as in the ordinary course of business, and a memorandum signed by the cashier and the acting directors (and which may be indorsed on the mortgage or purchase-deed) will, it is apprehended, be sufficient evidence of the payment. In dealing with societies who lend money on mortgage, but who (as is often the case with the older insurance companies) have no officers specifically appointed to receive money when re-paid, the practice is to obtain a resolution by the acting directors appointing persons to whom it shall be paid as trustees for the society, and whose receipt is taken on the deed. Or the resolution may be that the money shall be paid into the banking-house of the society to the credit of the society, leaving it to be drawn out by the usual agents of the society. In either case the resolution may be noticed in the deed, and an attested copy of it preserved as a muniment of title.

Of course, in the view above taken, no evidence of the directors or officers themselves having been duly appointed can be required; to bind the shareholders it is sufficient that the persons who authorize the payment or receive the money are the public and acknowledged agents of the society for such purposes. If it were essential to prove the regularity of the appointment of the directors or officers, it would obviously be impossible to deal with joint-stock companies as mortgagees, on account of the nature and extent of the evidence which would be required. In fact, these transactions must be treated, not as though the directors or other officers were trustees for the shareholders, but as though they were the active partners in, or agents for the partnership.

Most modern deeds of settlement provide that persons paying money to the acting officers of the company shall be thereby discharged.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

and charges of the said A. B. and C. D., their heirs, executors, administrators, or assigns, re-convey and re-assign all and singular the said hereditaments and premises hereinbefore released and assigned, or expressed and intended so to be, unto and to the use of the said A. B. and C. D., their heirs, executors, administrators, and assigns, according to the nature and quality thereof, and their rights and interests therein respectively (*e*), or as they shall in that behalf order and direct, and that free from all incumbrances whatsoever made, done, or committed by the said E. F., G. H., and I. K., or any of them, their or any of their heirs, executors, administrators, or assigns: AND THEY the said A. B. and C. D. do, for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant with the said E. F., G. H., and I. K., and their executors and administrators, by these presents, that on demand in writing to be signed by the said E. F., G. H., and I. K., or any of them, or by any other director or directors for the time being of the said bank, and left upon the premises hereby released, or ex-

Joint and several covenant for payment of mortgage-money.

(*e*) The words "according to their rights and interests therein" refer to the equitable doctrine, that freehold or copyhold property, purchased with partnership capital for partnership purposes, becomes personal estate. It was formerly conceived that such property was personal estate only for the purpose of satisfying the claims on the partnership; (1 My. & Ke. 653, 654); but it is now established that all property purchased with partnership capital for partnership purposes is itself capital, and has, to every intent, the qualities of personal estate. (*Ripley* v. *Waterworth*, 7 Ves. 425; *Townsend* v. *Devaynes*, 1 Montag. Law of Partnr. App. 97, and 1 Roper's Husband and Wife, (Jacob's ed.) 346, n.; S. C. cited 1 My. & Ke. 655; *Fereday* v. *Wightwick*, 1 Russ. & Myl. 45; *Phillips* v. *Phillips*, 1 Myl. & Ke. 649; *Broom* v. *Broom*, 3 My. & Ke. 443). It is not however sufficient to convert lands into personalty, that they are purchased with partnership money, unless they are also purchased for partnership purposes; (*Randall* v. *Randall*, 7 Sim. 271); and it seems that, even if land be brought into partnership by a partner, under an agreement that it shall be held as partnership property, and it be used solely for partnership purposes, yet, unless it has been purchased with partnership money, the share of the partner by whom it was brought in is personal estate only for the payment of the debts of the partnership, and not as between his heir and personal representatives. (*Cookson* v. *Cookson*, 8 Sim. 529). But this was a special case.

Land purchased with partnership money, for partnership purposes, is personal estate.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

pressed and intended so to be, or upon any part thereof, addressed to or for the said A. B. and C. D., or the person or persons for the time being carrying on or having carried on business in the name of the said firm of B. & D., or any of them, their or any of their executors or administrators, or to or for any person or persons liable to pay the monies intended to be hereby secured, or any part thereof, they the said A. B. and C. D., or the person or persons for the time being carrying on or having carried on business in the name of the said firm of B. & D., or some of them, their or some of their heirs, executors, or administrators, shall and will pay, or cause to be paid, to one of the cashiers for the time being of the said bank, the balance which, on the account-current of the said firm of B. & D., shall, for the time being, be due or owing to the said bank for bills or notes discounted or paid, or other loans, credits, or advances made to or for the accommodation, or at the request of the said A. B. and C. D., or the person or persons for the time being carrying on business in the name of the said firm of B. & D., or for interest or commission or other lawful charges and expenses, and, in case such balance shall not be paid on such demand, shall and will pay or cause to be paid such interest, after the rate of £5 per cent. per annum, as shall legally accrue due upon such balance or any part thereof, up to the time at which the same shall be paid (*f*): AND FURTHER, that they the said A. B. and

—and not to remove mill or machinery;

Compound interest not allowed in mortgages.

(*f*) It is the rule of equity not to allow compound interest between mortgagor and mortgagee, at least when the mortgage is of land; (*Procter* v. *Cowper*, Pre. Ch. 116; *Waring* v. *Cunliffe*, 1 Ves. Jun. 99); and it seems doubtful, whether interest will be allowed on costs and charges; (*Procter* v. *Cowper*, ubi supra; *Howard* v. *Harris*, 1 Vern. 194; *Hodgson* v. *Hodgson*, 2 Keen, 712); and an agreement entered into at the date of the mortgage for turning interest which may not be regularly paid into principal is invalid. (*Broadway* v. *Merecroft*, Mose. 248; *Mitford* v. *Featherstonhaugh*, 2 Ves. 445; *Lord Ossulston* v. *Lord Yarmouth*, 2 Salk. 449; *Bosanquet* v. *Dashwood*, Forr, 37; see, too, 9 Ves. 271, and the cases cited infra).

As to the nature of mortgages for accounts-current.

Hence, in drawing a mortgage to secure the balance of an account-current, in which it is intended that from time to time rests shall be made, so that unpaid interest shall become principal, it is necessary to see that the deed is not so constructed as to come within the scope of the above-

C. D., or the person or persons for the time being, carrying on business in the name of the said firm of B. & D., or any

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

mentioned rule. The point to be attended to is, that the deed shall not appear to be a security for the monies from time to time becoming due on the rests, with interest on those monies from the respective times of their being advanced; that is a mere matter of ordinary business between the debtor and creditor, and is to be regulated by the usual course of trade; the mortgage must only come into operation, and be a security for the *final balance* due from the mortgagor when the account is closed. Thus, in a mortgage to bankers to secure an account-current, it appeared that it was the practice of the bankers at particular periods to strike balances of principal and interest, and to carry the consolidated sum as the first item of principal to a new account, and whenever a sum was paid in by the debtor, that sum was first applied in discharge of the interest accrued due, since the striking of the last balance, and then in reduction of the balance, *i. e.* of the principal. This practice had never been objected to by the debtor, and was sanctioned by the judgment of Lord Manners. "I do not," said his Lordship, "consider the defendants as mortgagees; for the mortgages were executed as securities collateral *for any balance that might eventually be in their favour*. Their acquiescence is a proof they did not consider it a mortgage dealing." (*Lord Clancarty* v. *La Touche*, 1 Ball & Beatt. 420). It is said by Lord Eldon, that, after having made rests, the mortgagee cannot, when the debt comes to a certain sum take a real security and £5 per cent.; but he adds, "I do not know if that would do in a mercantile transaction." (*Ex parte Bevan*, 9 Ves. 223).

In another case, in which there was not a mortgage, it was held, that the making of rests, and so obtaining compound interest, was justified by the course of trade and dealing between the parties, but Lord Commissioner Eyre desired it to be observed, that the Court was not to be understood to have laid down any thing that had relation to mortgages. (*Morgan* v. *Mather*, 2 Ves. Jun. 15; see, too, *Ex parte Champion*, 3 Bro. C. C. 440; *Calcot* v. *Walker*, 2 Anst. 495). It might, perhaps, have been thought, that the observations in *Ex parte Bevan*, and in *Morgan* v. *Mather*, threw some doubt on the principle established by *Lord Clancarty* v. *La Touche;* but the case has been subsequently confirmed by the authority of *Bufford* v. *Bishop*, 5 Russ. 346. That was a case of a mortgage to secure a banking account, and was held to be valid. "It being admitted," said the Master of the Rolls, "that the mode of dealing between these parties by rests would, because it is according to the course of trade, support an action at law for the several balances reported due, I cannot apprehend any principle, why, in such case, a security upon land may not be given for the final balance which may be due between the banker and his customer." As to what course of trade is permissible, see *Ex parte Millington*, 3 Deac. & Ch. 298; 1 Mont. & Ayr. 114.

Some question has been made as to the intervals at which rests can be Intervals at

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OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

of them, their or any of their heirs, executors, administrators, or assigns, shall not and will not pull down, remove,

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which rests may be made.

lawfully made. In *Lord Clancarty* v. *La Touche*, ubi supra, a rest made at the end of three months was not allowed; but in *Ex parte Bevan*, and in *Rufford* v. *Bishop*, six months' rests were held good. The true principle seems to be, that the intervals of the rests have nothing to do with the security for the final balance; their validity depends on the course of trade, and if it were the practice to compute interest between the parties from day to day, a good security might still be given for the final balance. See, however, *Sackett* v. *Bassett*, 4 Madd. 58; and the observations infra.

Interest actually due may be converted into principal.

Although interest cannot be converted into principal so as to carry interest, by an agreement contained in the mortgage-deed, or at any time before the interest to be converted has actually accrued due, yet interest actually due may, by agreement between the parties, be converted into principal and carry interest. (*Lord Ossulston* v. *Lord Yarmouth*, 2 Salk. 449; *Brown* v. *Barkham*, 1 P. Wms. 652; *Earl of Chesterfield* v. *Cromwell*, 1 Eq. Ca. Abr. 287). But, in a case in which the mortgagee compelled the mortgagor to account and convert interest into principal every six months, at a higher rate of interest than that made payable on the original principal, the agreement was set aside. (*Thornhill* v. *Evans*, 2 Atk. 330; see, however, 2 You. & Col. 96).

The agreement to convert interest into principal must be clearly stated, and the mere statement of an account is not sufficient. (*Brown* v. *Barkham*, 1 P. Wms. 652). But where interest has been long paid on a consolidated sum of principal and interest, an agreement to that effect will be inferred. (*M'Carthy* v. *Llandaff*, 1 Ball & Beatt. 375). And so an agreement will be inferred from the course of trade, and the general acquiescence of the mortgagor. (*Lord Clancarty* v. *La Touche*, 1 Ball & Beatt. 420; and the other cases of that nature cited supra).

At what period rests may be made.

In the modern case of *Sackett* v. *Bassett*, 4 Madd. 58, the original mortgage was for £730, with interest at 5 per cent., and, after various dealings between the parties, a new mortgage was given for £1,200, which was composed of the £730, of the interest due thereon, and *of interest upon that interest*. In a suit for foreclosure, the Master reported that the sum of £1,200 was made up in part of interest, calculated quarterly on the sum of £730, and by calculating interest upon such interest for the purpose of taking a higher rate of interest than £5 per cent. on the £730; and that he was of opinion, that the second mortgage being founded in usury was void; and that, as the first mortgage was satisfied by the second, nothing was due thereon. Exceptions were taken to this report, and the Vice-Chancellor directed that the question of usury should be tried at law in an action by the mortgagee on the covenant in the second mortgage-deed. It does not appear what subsequently became of the case. The report in *Sackett* v. *Bassett*, was founded, it is presumed, on the fact of the interest being converted into principal *quarterly*, and

or take away the said mill, cottages, engine-house, buildings, steam-engine, boilers, mill-gear, mill-wright work,

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

therein it agrees with *Thornhill* v. *Evans*, and *Lord Clancarty* v. *La Touche*, ubi supra; but it is not to be considered that the interest accrued due on interest, and which is calculated from annual or other proper rests, cannot be the subject of a new mortgage; for, as the Court allows interest accrued due to be converted into principal, it is of course legal to take a new mortgage for the consolidated sum. (*Blackburn* v. *Warwick*, 2 You. & Col. 92). In the last case, the rests were made at unequal intervals of more than one year, but it is presumed that there would be no objection to making the rests annual. And, it being the practice to reserve interest half-yearly, there seems to be no good reason why interest may not be converted into principal half-yearly. (See *Thornhill* v. *Evans*, 2 Atk. 330; 2 You. & Col. 96).

Effect of an assignment on interest accrued due.

If there be an arrear of interest due on a mortgage, and an assignment be made of the mortgage, the interest will not be converted into principal unless the mortgagor be a party to the arrangement. (*Earl of Macclesfield* v. *Fitton*, 1 Vern. 168; *Gladwyn* v. *Hitchman*, 2 Vern. 135; *Smith* v. *Pemberton*, 1 Ch. Ca. 67; S. C. 1 Eq. Ca. Abr. 287; *Lord Ossulston* v. *Lord Yarmouth*, 2 Salk. 449; *Anon.* Bunb. 41; *Matthews* v. *Walwyn*, 4 Ves. 118).

As to conversion of interest and costs into principal, against subsequent incumbrancer.

Interest cannot be turned into principal, so as to carry interest against a subsequent incumbrancer. (*Digby* v. *Craggs*, 2 Eden, 200; S. C. Amb. 612; *Neal* v. *Attorney-General*, Mos. 246; *Harris* v. *Harris*, 3 Atk. 722). But it seems that this rule does not apply to costs, charges, and expenses. (*Godfrey* v. *Watson*, 3 Atk. 518; *Manlove* v. *Bale*, 2 Vern. 34).

As to the calculation of interest in suits by mortgagees for foreclosure, or sale, see *Bruere* v. *Wharton*, 7 Sim. 483; *Edwards* v. *Cunliffe*, 1 Madd. 287; *Monkhouse* v. *The Corporation of Bedford*, 17 Ves. 380; and, in administration suits in which mortgagees are interested; see, *Whatton* v. *Cradock*, 1 Keen, 267; *Brewin* v. *Austin*, 2 Keen, 211.

As to mortgages given to secure debts on bills of exchange at interest higher than £5 per cent.

The statute 3 & 4 Will. 4, repeals the usury laws as to bills of exchange and promissory notes, at and under three months; and the statute 7 Will. 4 & 1 Vict. extends the repeal to bills and notes at and under twelve months. If the bill or note is the real and bonâ fide origin of the debt, a mortgage or other collateral security subsequently taken for the debt will be within the protection of the statutes. (*Connop* v. *Meaks*, 2 Ad. & Ell. 326; *Ex parte Knight*, 1 Dea. 459; *Ex parte Fyfe*, 2 Mont. & Ayr. 568). But where the loan is really contracted upon the mortgage, or other collateral security, it will not be brought within the protection of the statute by taking a bill of exchange or promissory note for the debt. (*Berrington* v. *Collis*, 5 Bing. N. C. 332). The late statute 2 & 3 Vict. c. 37, still further repeals the usury laws until the 1st of January, 1842, but excepts mortgages of land from the benefit of the repeal. (See too, *Holt* v. *Miers*, 5 Mee. & Wels. 168).

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

fixed or moveable machinery, implements, utensils, or premises hereinbefore released and assigned, or expressed and intended so to be, or any of them, or any part thereof, without the permission in writing of two of the directors for the time being of the said bank, unless in cases where such pulling down, removal, or taking away shall be to a small extent, and shall be rendered necessary by any of the said premises being worn out or injured: AND FURTHER, THAT the said A. B. and C. D., their heirs, executors, administrators, or assigns, or the person or persons for the time being carrying on business in the name of the said firm of B. & D., his or their executors, administrators, or assigns, shall and will at all times during the continuance of the security intended to be hereby made, keep the said premises hereinbefore released and assigned, or expressed and intended so to be, and every part thereof, in a good state of repair, and in perfect working order, and also insured against loss or damage by fire, in the sum of £—— at the least, and in such office or offices as any two of the directors for the time being of the said bank shall approve of, and shall and will pay or cause to be paid, all such annual and other premiums, duty, and sums of money as may become payable for keeping on foot the policies of the said insurance, and shall and will from time to time produce to any two of the directors for the time being of the said bank, or leave at the banking-house for time being in —— of the said bank, the policies aforesaid, and the receipts for the payment of the said premiums and other sums of money as aforesaid, and shall and will apply all and every the monies which shall be received by virtue of the said policies, or any of them, either in making good the loss or damage, or in or towards discharge of the monies which shall for the time being be due to the said bank, on the account-current aforesaid, as shall be required on behalf of the said bank (*g*):

—and to keep the premises in repair and insured against fire;

(*g*) With respect generally to the provision for insurance against fire of mortgaged property, see supra, p. 499, note (*d*). It is not very usual and is not very fair towards the mortgagor to stipulate, that monies received under an insurance shall be applied in payment of the debt, as such an application leaves the mortgagor devoid of the means of rebuild-

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

AND ALSO, that if default shall be made in payment of the said annual and other premiums and sums of money, or any of them, or otherwise, in keeping the said premises insured as aforesaid, it shall be lawful for the directors of the said bank to pay or cause to be paid such annual and other premiums and sums of money for keeping the said premises insured, as aforesaid, in any sum not exceeding the sum of £——, and to carry any sum or sums of money which shall be so paid to the credit of the said bank on the said account-current of the said firm of B. & D.: AND IT IS HEREBY agreed and declared that any building, engines, machinery, implements, or utensils, which shall be erected or placed or used upon the said lands and hereditaments hereinbefore released or expressed, and intended so to be, or any part of them, during the continuance of this present security, either in lieu of or in addition to any buildings, engines, machinery, implements, or utensils, now standing or being there, shall be deemed to be included in the security intended to be hereby made, and be subject to the provisions and covenants herein contained (*h*): AND THE SAID A. B. and C. D. do, for themselves, their heirs, executors, and administrators, and each of them doth, for himself, his heirs, executors, and administrators, covenant with the said E. F., G. H., and I. K., their heirs and assigns, by these presents, in manner following (that is to say), that they the said A. B. and C. D. respectively are, at the time of the sealing and delivery of these presents, lawfully and rightfully seised of or entitled to a good, sure, absolute, and indefeasible estate, of inheritance in fee-simple of and in all and singular the said lands, messuages, mill, buildings, and hereditaments, hereinbefore released, or mentioned, or intended so to be, with their appurtenances, subject as to the said hereditaments comprised in the said indenture of the 8th day

—and that on default by mortgagors the mortgagees may insure.

Declaration, that all buildings and machinery set up during the security, are to form part of it.

Joint and several covenants.

—for title.

ing his premises. Insurance monies ought to be applied in re-placing all parties in the situation in which they stood before the fire, and such is the rule in the absence of special stipulation.

(*h*) In respect to the application of this clause, see supra, note (*a*), and the cases there cited.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

of April, 1837, to the said power of appointment hereinbefore exercised or expressed, and intended so to be, but without any other condition, trust, power of revocation or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, charge, incumber, lessen, determine, defeat, or make void the same estate: AND THAT the said A. B. and C. D. now have in themselves good right, full power, and lawful and absolute authority to grant, bargain, sell, release, appoint, assign, and convey all the said lands, messuages, mill, buildings, hereditaments, machinery, and premises, hereinbefore released and assigned, or expressed and intended so to be, unto and to the use of the said E. F., G. H., and I. K., their heirs, executors, administrators, and assigns respectively in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO THAT, if default shall be made in payment of the said balance on the said account-current, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said E. F., G. H., and I. K., their heirs, executors, administrators, and assigns, at any time or times thereafter, into and upon all and every the said lands, messuages, mill, buildings, hereditaments, and premises, hereinbefore released and assigned, or expressed and intended so to be, or any of them, or any part or parts thereof to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive, and take the rents, issues, and profits thereof, to and for his and their own use, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B. and C. D., or either of them, their or either of their heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having, or lawfully or equitably claiming, or to have, or lawfully or equitably claim, in or to the said lands, messuages, mill, buildings, hereditaments, and premises, or any of them, or any part or parts thereof: AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, and dis-

—for right to convey.

—for quiet enjoyment after default.

—free from incumbrances;

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

charged, or otherwise by the said A. B. and C. D., or one of them, their, or one of their heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever: AND MOREOVER, THAT they the said A. B. and C. D., their heirs, executors, and administrators, and all and every other persons and person whosoever, having or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest, of, in, or to the said lands, messuages, mill, buildings, hereditaments, and premises, hereinbefore released and assigned, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time and at all times hereafter, upon the request of the said E. F., G. H., and I. K., or any of them, their or any of their heirs, executors, administrators, or assigns, but at the costs and charges of the said A. B. and C. D., or one of them, their or one of their heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, and things, conveyances, assignments, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, conveying, assigning, and assuring all the said lands, messuages, mill, buildings, machinery, hereditaments, and premises hereinbefore released and assigned, or expressed and intended so to be, unto the said E. F., G. H., and I. K., their heirs, executors, administrators, and assigns, according to the nature and quality of the property, and in manner aforesaid, according to the true intent and meaning of these presents, as by the said E. F., G. H., and I. K., or any of them, their or any of their heirs, executors, administrators, or assigns, or their or any of their counsel in the law shall be reasonably devised or advised and required: PROVIDED ALSO, and it is hereby agreed and declared, between and by the parties to these presents, and the true intent and meaning of them and of these presents nevertheless further is,

—and for further assurance.

Proviso for quiet enjoyment by the mortgagors until default.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

that it shall be lawful for the said A. B. and C. D., their heirs, executors, administrators, and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said lands, messuages, mill, buildings, machinery, hereditaments and premises hereinbefore released and assigned, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof, to his and their own use, until default shall be made in payment of the said balance on the said account-current as aforesaid, or some part thereof, contrary to the aforesaid proviso or covenant for payment of the same, and the true intent of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of or from or by the said E. F., G. H., and I. K., or any of them, their or any of their heirs, executors, administrators, or assigns, or by any other person or persons whomsoever, lawfully claiming or to claim by, from, or under them, or any of them: AND IT IS HEREBY further provided and declared, that it shall be lawful for the said E. F., G. H., and I. K., or the survivor or survivors of them, or the executors or administrators of such survivor, their or his assigns, at any time or times hereafter, while any money shall remain due or owing to the said bank on the account-current of the said firm of B. & D. as aforesaid, without any further consent on the part of the said A. B. and C. D., or either of them, their or either of their executors, administrators, or assigns, or of any other person or persons, to make, sell, and dispose of the said lands, messuages, mill, buildings, steam-engines, boilers, mill-gear, millwright work, fixed and moveable machinery, hereditaments and premises hereinbefore released and assigned, or expressed or intended so to be, or for the time being subject to the security intended to be made by these presents, or any part or parts thereof, either together or in parcels, (and as to the said steam-engines, boilers, mill-gear, millwright work, fixed and moveable machinery, and other premises of a like nature, either together with the buildings or land to or upon which the same shall be fixed or be standing or being, or separately and detached therefrom), and either by public auction or private contract, with full power

Power of sale.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

upon any such sale or sales to make any stipulations as to title or otherwise which they or he shall deem necessary; and also with full power to buy in the premises, or any part thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises, or any part thereof, and to re-sell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby; and that for the purposes aforesaid, or any of them, it shall be lawful for the said E. F., G. H., and I. K., and the survivors and survivor of them, and the executors or administrators of such survivor, their or his assigns, to make and execute, or cause to be made and executed, all such agreements, deeds, conveyances, assignments, and assurances, as they or he shall think fit: AND IT IS HEREBY agreed and declared, that, upon any sale or sales which shall be made under the said power of sale by the executors or administrators of the survivor of them, the said E. F., G. H., and I. K., or by any other person or persons who may not be seised of the legal estate in the premises to be sold, the heirs of the said survivor, or any other person or persons in whom the legal estate of the same premises, or any part thereof shall be vested, shall make such conveyances and assurances of the same for the purpose of carrying the sale thereof into effect, as the person or persons by whom the sale shall be made shall direct: PROVIDED ALSO, and it is hereby agreed and declared, that the said E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, will not and shall not execute the power of sale hereinbefore contained, unless and until they or he shall have previously given a notice in writing to some person liable to pay to the said bank the balance of the account-current of the said firm of B. & D., or entitled to redeem the said mortgaged premises, or some part thereof, to pay off the monies which for the time being shall be due on the security of these presents, or left a notice in writing to that effect at or upon the said premises hereby

Declaration as to the conveyance of the legal estate in certain cases.

Proviso that the power of sale shall not be exercised till after notice given.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

released, or some part thereof, and default shall have been made in payment of such monies, or some part thereof, for the space of one calendar month, to be computed from the time of giving or leaving such notice: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers thereat shall not be bound to see or inquire whether any such notice has been given or left, as in the clause or provision lastly hereinbefore contained is mentioned, or whether any money remains due or owing on the security of these presents, or otherwise, as to the propriety or regularity of such sale; and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers thereat, be deemed and taken to be within the aforesaid power in that behalf, and be valid and effectual accordingly; and the remedy of the said A. B. and C. D., their heirs, executors, administrators, or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, shall be in damages only: AND IT IS HEREBY agreed and declared, that upon any such sale as aforesaid, the receipt or receipts in writing of any of the cashiers for the time being of the said bank for the purchase-money of the premises to be sold shall be an effectual discharge, or effectual discharges, to the purchaser or purchasers of the money therein respectively expressed to be received, and that such purchaser or purchasers, after payment of his or their purchase-money to any of the cashiers for the time being of the said bank, shall not be concerned to see to the application of such money, or be answerable for any loss, misapplication, or nonapplication thereof: AND IT IS HEREBY further agreed and declared, that all and singular the monies which shall arise from any sale which shall be made as aforesaid, shall be held upon the trusts following, (that is to say), upon trust, that in the first place, by, with, or out of the same monies, all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto, shall be

Proviso that no purchaser shall be bound to see that notice has been given, or as to the propriety of the sale.

Mortgagees' receipts to be good discharges for the purchase-money.

Declaration of trusts of purchase-monies.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

paid or discharged, and that in the next place such monies shall be applied in or towards satisfaction of all and singular the monies which for the time being shall be due or owing on the security of these presents, and that the surplus (if any), of the monies to arise from such sale or sales as aforesaid shall be paid unto the said A. B. and C. D., their executors, administrators, or assigns, for their proper use and benefit (*i*): PROVIDED ALWAYS, and it is hereby agreed and declared, that the said E. F., G. H., or I. K., or any of them, their or any of their executors or administrators, shall not be answerable or accountable for any involuntary losses which may happen in or about the execution of the aforesaid power and trusts, or any of them; PROVIDED ALSO, and it is hereby agreed and declared, that the aforesaid power of sale, or anything herein contained, shall not in anywise prejudice or affect the right of the said E. F., G. H., and I. K., their heirs, executors, administrators, or assigns, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being: AND IT IS HEREBY agreed and declared that these presents are intended to be a security for the balance, for the time being, on the account-current of the firm of B. & D., (whether the same firm shall consist of the present partners or of one of them, or of them or either of them together with any other person or persons, or of any other persons or person only), due or owing to the said —— bank of ——, of whatsoever partners or shareholders the Company carrying on the business of the said bank shall from time to time consist (*k*): AND IT IS HEREBY declared that these

Indemnity clause.

Proviso that the power of sale shall not affect the right to foreclose.

General declaration as to the nature of the security.

Declaration as to the amount

(*i*) The mortgaged estate being partnership property, the surplus monies are treated as personalty, supra, note (*e*).

(*k*) If a security be given to partners generally, the retirement or death of any of the partners, or the introduction of a new partner, will prevent the security from extending to subsequent dealings. (*Wright* v. *Russell*, 3 Wils. 530; S. C. 2 W. Bl. 934; *Barker* v. *Parker*, 1 T. R. 287; *Myers* v. *Edge*, 7 T. R. 254; *Dance* v. *Girdler*, 1 N. R. 34; *Strange* v. *Lee*, 3 East, 484). And where the security to partners was for the re-payment "to them of any money advanced by them, or any or either of them." It

A security given to a firm does not extend to dealings after a change in the partners.

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

presents are intended to be a security for the balance to be due on the account-current aforesaid, and that, for the pur-

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of the money to be ultimately recoverable.

was held, that the security did not extend to monies advanced by the survivors after the death of one. For the money being to be repaid to all, showed, that, by the advances made by any or either of them, must be meant advances so made on behalf of all. (*Weston* v. *Barton*, 4 Taunt. 673; overruling *Barclay* v. *Lucas*, 1 T. R. 291, n.).

And where the security was for the re-payment to A., B., and C., (partners), or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, of money becoming due to A., B., and C., or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, and C. died; and his executors, and A. and B., by virtue of the articles of partnership, carried on the business, and made further advances, it was held, that the security did not extend to those advances. (*Pemberton* v. *Oakes*, 4 Russ. 154; see, also, *Jones* v. *Maund*, 3 You. & Col. 347; *Ex parte M'Gae*, 19 Ves. 607; 2 Rose, 376). And a deposit of deeds with A., B., and C., bankers, as a security for the balance of any sums which "you may advance," will not cover advances made by the bank after a change of partners. (*Ex parte Kensington*, 2 Ves. & Bea. 79).

It has been doubted whether the introduction into a firm of a nominal partner (*i. e.* a partner merely receiving a salary, and not sharing in the profit or loss), would prevent a security given to the old firm from extending to subsequent transactions (*Ex parte Watson*, 19 Ves. 459); but it does not appear that the question has been decided. In a case where a security was given to certain persons and their successors, as governors of a certain society which was afterwards incorporated, it was held that the security was not available. (*Dance* v. *Girdler*, 1 N. R. 94). But where a bond was given to the trustees of an Insurance Company as a security for a clerk, it was held, that the bond remained in force notwithstanding changes in the members of the Company. (*Metcalfe* v. *Bruin*, 12 East, 400; S. C. 2 Camp. 422.

But a security may be so extended.

There is no doubt that a security may be so worded as to extend to advances and transactions made or entered into after a change in the firm or Company. (3 East, 420; *Metcalfe* v. *Bruin*, ubi supra). And where title-deeds were deposited, with a letter addressed to the firm stating that they were so deposited "as a security for the payment of the running balance, which for the time being may be accruing from [*the depositor*] to you, or any of you alone, or with any other partner or partners," it was held, that the estate to which the title-deeds related was a security for advances made by the firm after one of the partners retired. (*Ex parte Lloyd*, 3 Dea. 305.

The same rules apply to secu-

The converse of the principle explained in the preceding observations is likewise true; for a security given by partners will not extend to

poses of the act imposing a duty ad valorem on such mortgage securities, the total amount of the money to be ultimately recoverable hereupon shall not exceed £——. IN WITNESS &c. (*l*).

OF A MILL AND MACHINERY BY PARTNERS TO A JOINT STOCK BANK.

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transactions entered into after a change in the firm. Thus, a bond which was given to secure such sums as should be advanced to meet bills drawn by A. & B. (partners), or either of them, was held not to extend to bills drawn by A. after the death of B. (*Simson* v. *Cooke*, 1 Bing. 452). But in this case, likewise, the security may, by the use of apt words, be extended to transactions entered into after a change in the partners. (1 Bing. 460, 461; *Simpson* v. *Ingham*, 2 B. & C. 65; S. C. 2 Dowl. & Ry. 249).

rities by partners.

There is an important distinction in this matter, between securities under seal and securities not under seal—because the effect of the former cannot be enlarged by parol evidence. (*Ex parte Hooper*, 19 Ves. 479; S. C. 2 Rose, 328, and 1 Mer. 7). Whereas securities not under seal may be explained and varied by extrinsic evidence. Hence, securities not under seal, which would not originally cover advances made after a change of partners, may be shewn to be intended to have that effect. (*Ex parte Kensington*, 2 Vea. & Bea. 79; *Ex parte Marsh*, 2 Rose, 239; *Ex parte Lloyd*, 1 Glyn & Jam. 389; *Ex parte Alexander*, Ibid. 409. But even in the case of an instrument under seal, given as a security to a firm *by the name of the firm*, parol evidence was admitted to shew who composed the firm. (*Moller* v. *Lambert*, 2 Camp. 548).

(*l*) As to the use and effect of this proviso, see the Stamp Act, 55 Geo. 3, c. 184, *Art.* MORTGAGE. If the proviso be omitted, a £25 stamp would be necessary, as the mortgage would be for an unlimited amount.

LVII.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

MORTGAGE *of* FEE-SIMPLE *Lands and of Lands in* SETTLEMENT *subject to a* POWER *of* APPOINTMENT, *the Money being advanced in* DISTINCT *Sums by* TWO SETS *of Mortgagees* (*a*). POWER *of Sale.* PROVISO *as to the* ORDER *of* LIABILITY *between the Mortgagors and the Estates.* TRUSTS *of the Money arising from Sale of the* SETTLED ESTATES.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*one of the mortgagors*], of the first part; C. D., of

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Construction of mortgage to different mortgagees.

(*a*) If money is to be lent on mortgage in distinct sums, by two different mortgagees or sets of mortgagees, who are to be paid pari passu, the object may be effected by conveying the land to all the mortgagees, with a proviso for redemption on payment of the mortgage debts and interest, to the several owners, the mortgagor covenanting separately with the different mortgagees for payment of their respective debts and interest. This is the method adopted in the precedent in the text, and it has no other inconvenience than that of obliging each set of mortgagees to obtain the concurrence of the other before they can deal with the land. But this method is not very practicable where the different mortgagees are numerous, on account of the great length to which the mortgage-deed would extend, and on account of the inconvenience which might ensue from vesting the land in a great number of persons. If, therefore, several persons are to contribute to a sum to be lent on mortgage, it is usual to make the mortgage to trustees for the entire sum, the interests of the several lenders being ascertained, either by a separate deed, or on the face of the mortgage. It is more convenient to the mortgagor, that the mortgage-deed should deal with the trustees alone, as lending a sum of money belonging to them on a joint account; (supra, p. 480); but such a course cannot be deemed prudent for the lenders, unless the trustees are persons in whom they may place perfect confidence. For, if the trustees have power to discharge the land, it is clear that the lenders have little else to look to than the personal security

&c., [*the other mortgagor*], of the second part; E. F. and G. H., &c., [*first set of mortgagees*], of the third part; I. K. and L. M., of &c., [*second set of mortgagees*], of the fourth part; and X. and Y., [*trustees*], of the fifth part: WHEREAS, by an indenture of appointment, bearing date the 26th day of November, 1832, and made or expressed to be made between [*parties*], (being a settlement executed previously to and in consideration of the marriage then intended, and shortly afterwards had and solemnized between the said C. D., and the said E. D., his wife), the manors, messuages, farms, lands, and other hereditaments, firstly hereinafter particularly mentioned, and intended to be hereby appointed, were appointed and limited from and after the solemnization of the said then intended marriage, to the use of such person and persons, for such estate and estates, interest and interests, upon such trusts, and to and for such ends, intents, and purposes, and in such sort, manner, and form, in all respects, as the said A. B. and C. D. during their joint lives, or as the survivor of them during his life, by any deed or deeds, instrument or instruments in writing, to be by them or him sealed and delivered in the presence of two or more credible witnesses should direct, limit, and appoint, and in default of and until and subject to such direction, limitation, or appointment to the uses and upon the trusts therein mentioned: AND WHEREAS the said A. B. is seised or entitled for an estate of inheritance in fee-simple in possession of or to the castle, park, messuages, lands, and other hereditaments, secondly hereinafter particularly mentioned, and intended to be hereby granted and released, subject to a mortgage for £10,000, which, under and by virtue of indentures of lease and release, bearing date respectively the —— and —— days

SETTLED LAND TO TWO SETS OF MORTGAGEES.

Recital of settlement of part of the lands to be mortgaged.

—of one of the mortgagors being seised in fee of the other lands, subject to certain mortgages.

of the trustees. It appears to be settled, that when a mortgage of this kind is made, a person entitled to a portion of the mortgage-money cannot sustain a suit for foreclosure without bringing the persons entitled to the remainder of the money before the Court. (*Lowe* v. *Morgan*, 1 Bro. C. C. 368; *Palmer* v. *Earl of Carlisle*, 1 Sim. & Stu. 423). The case of *Montgomery* v. *Marquis of Bath*, 3 Ves. 560; must be taken to be overruled.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

of ——, the release being made, or expressed to be made, between [*parties*], is now vested in the said ——, and also subject to another mortgage for £12,000, which, under and by virtue of an indenture, bearing date the —— day of ——, and made, or expressed to be made, between [*parties*] is now vested in the said ——, and also subject to a mortgage made by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made, or expressed to be made, between [*parties*], and for securing to the said —— and ——, the sum of £5,000 and interest, upon which last-mentioned mortgage £2,000 and no more remains due, and free from all other incumbrances: AND WHEREAS the said E. F. and G. H., and the said I. K. and L. M. have agreed, at the request of the said A. B. and C. D., to advance and lend them the sum of £60,000 in manner and in the proportions hereinafter mentioned, (that is to say), the said E. F. and G. H. to advance £45,000, part of the said sum of £60,000, out of monies belonging to them upon a joint account, and the said I. K. and L. M. to advance the sum of £15,000, residue of the said sum of £60,000, out of monies belonging to them upon a joint account, but upon having the re-payment of the said sums of £45,000 and £15,000, with interest after the rate hereinafter mentioned, secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £45,000 to the said A. B. and C. D., at or immediately before the sealing and delivery of these presents, paid by the said E. F. and G. H. out of monies belonging to them on a joint account, and in consideration of the sum of £15,000 to the said A. B. and C. D., at the same time paid by the said I. K. and L. M. out of monies belonging to them on a joint account, (the receipt of which said sums of £45,000 and £15,000, they the said A. B. and C. D. do hereby acknowledge, and of and from the same respectively, and every part thereof respectively, do and each of them doth acquit, release, and discharge the said E. F. and G. H., and each of them, their and each of their heirs, executors, administrators, and

—of agreement for loan.

Witnesseth.

Consideration.

Receipt.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

assigns, and also the said I. K. and L. M., and each of them, their and each of their heirs, executors, administrators, and assigns for ever, by these presents), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to them the said A. B. and C. D. for this purpose given by the said indenture of the 26th day of November, 1832, and of every or any other power or authority in anywise enabling them in this behalf, they the said A. B. and C. D. do by this present deed or instrument in writing, by them sealed and delivered in the presence of the two credible persons, whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by the said A. B. and C. D., direct, limit, and appoint, that ALL THOSE the manors, or reputed manors of ——, with the rights, members, and appurtenances in the county of ——, and also all and singular the messuages, farms, lands, and other hereditaments in —— aforesaid, (the tenants' names and rentals whereof are mentioned in the first schedule to these presents), and all other the messuages, farms, lands, and other hereditaments (if any) in ——, or any of them, which, by the said indenture of the 26th day of November, 1832, were limited to the joint appointment of the said A. B. and C. D., as hereinbefore is mentioned, [*general words*], shall from and after the sealing and delivery of these presents, go, remain, and be to the use of the said E. F., G. H., I. K., and L. M., their heirs and assigns for ever, subject nevertheless to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said E. F., G. H., I. K., and L. M., (in their actual possession, &c., *supra*, p. 198), and to their heirs and assigns, ALL THAT, &c., [*parcels*], (the tenants' names and rentals of which said hereditaments lastly hereinbefore mentioned, and intended to be hereby granted and released, or of such parts thereof as are in the occupation of tenants,

Appointment of settled lands.

Parcels by reference to schedule.

Witnesseth, further conveyance of the fee-simple lands.

Parcels by reference to schedule.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

of ——, the release being made, or expressed to be made, between [*parties*], is now vested in the said ——, and also subject to another mortgage for £12,000, which, under and by virtue of an indenture, bearing date the —— day of ——, and made, or expressed to be made, between [*parties*] is now vested in the said ——, and also subject to a mortgage made by indentures of lease and release, bearing date respectively the —— and —— days of ——, the release being made, or expressed to be made, between [*parties*], and for securing to the said —— and ——, the sum of £5,000 and interest, upon which last-mentioned mortgage £2,000 and no more remains due, and free from all other incumbrances: AND WHEREAS the said E. F. and G. H., and the said I. K. and L. M. have agreed, at the request of the said A. B. and C. D., to advance and lend them the sum of £60,000 in manner and in the proportions hereinafter mentioned, (that is to say), the said E. F. and G. H. to advance £45,000, part of the said sum of £60,000, out of monies belonging to them upon a joint account, and the said I. K. and L. M. to advance the sum of £15,000, residue of the said sum of £60,000, out of monies belonging to them upon a joint account, but upon having the re-payment of the said sums of £45,000 and £15,000, with interest after the rate hereinafter mentioned, secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £45,000 to the said A. B. and C. D., at or immediately before the sealing and delivery of these presents, paid by the said E. F. and G. H. out of monies belonging to them on a joint account, and in consideration of the sum of £15,000 to the said A. B. and C. D., at the same time paid by the said I. K. and L. M. out of monies belonging to them on a joint account, (the receipt of which said sums of £45,000 and £15,000, they the said A. B. and C. D. do hereby acknowledge, and of and from the same respectively, and every part thereof respectively, do and each of them doth acquit, release, and discharge the said E. F. and G. H., and each of them, their and each of their heirs, executors, administrators, and

—of agreement for loan.

Witnesseth.

Consideration.

Receipt.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

assigns, and also the said I. K. and L. M., and each of them, their and each of their heirs, executors, administrators, and assigns for ever, by these presents), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to them the said A. B. and C. D. for this purpose given by the said indenture of the 26th day of November, 1832, and of every or any other power or authority in anywise enabling them in this behalf, they the said A. B. and C. D. do by this present deed or instrument in writing, by them sealed and delivered in the presence of the two credible persons, whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by the said A. B. and C. D., direct, limit, and appoint, that ALL THOSE the manors, or reputed manors of ——, with the rights, members, and appurtenances in the county of ——, and also all and singular the messuages, farms, lands, and other hereditaments in —— aforesaid, (the tenants' names and rentals whereof are mentioned in the first schedule to these presents), and all other the messuages, farms, lands, and other hereditaments (if any) in ——, or any of them, which, by the said indenture of the 26th day of November, 1832, were limited to the joint appointment of the said A. B. and C. D., as hereinbefore is mentioned, [*general words*], shall from and after the sealing and delivery of these presents, go, remain, and be to the use of the said E. F., G. H., I. K., and L. M., their heirs and assigns for ever, subject nevertheless to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said E. F., G. H., I. K., and L. M., (in their actual possession, &c., *supra*, p. 198), and to their heirs and assigns, ALL THAT, &c., [*parcels*], (the tenants' names and rentals of which said hereditaments lastly hereinbefore mentioned, and intended to be hereby granted and released, or of such parts thereof as are in the occupation of tenants,

Appointment of settled lands.

Parcels by reference to schedule.

Witnesseth, further conveyance of the fee-simple lands.

Parcels by reference to schedule.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

are specified in the second schedule to these presents), [*general words*]: To HAVE AND TO HOLD the said castle, park, messuages, lands, hereditaments, and all and singular other the premises hereby granted and released, or expressed and intended so to be, unto the said E. F., G. H., I. K., and L. M., their heirs and assigns, to the use of the said E. F., G. H., I. K., and L. M., their heirs and assigns for ever, subject nevertheless to the said mortgages thereof hereinbefore mentioned to be subsisting, and also subject to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B. and C. D., or either of them, their or either of their heirs, executors, administrators, or assigns, or any other person or persons interested in the equity of redemption of the said premises, shall and do pay, or cause to be paid, to the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £45,000, and the sum of £1,800 as and for a year's interest for the same, at the rate of £4 per cent. per annum, making together the sum of £46,800, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £900, part thereof, being half-a-year's interest for the said sum of £45,000 at the rate aforesaid, on the —— day of ——, and the sum of £45,900 residue thereof, being the whole of the said principal sum of £45,000, with another half-year's interest for the same at the rate aforesaid, on the —— day of ——, and shall and do pay or cause to be paid unto the said I. K. and L. M., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £15,000, and the sum of £600 as and for a year's interest for the same, at the rate of £4 per cent. per annum, making together the sum of £15,600, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £300, part thereof, being half-a-year's interest for the said sum of £15,000, at

Habendum.

Proviso for redemption.

the rate aforesaid, on the —— day of ——, and the sum of £15,300, residue thereof, being the whole of the said principal sum of £15,000, with another half-year's interest for the same at the rate aforesaid, on the —— day of ——, without any deduction or abatement whatsoever out of the same principal sums or interest respectively, or any part thereof respectively, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, or any other cause, matter, or thing whatsoever; then and in such case they the said E. F., G. H., I. K., and L. M., or the survivors or survivor of them, or the heirs of such survivor, their or his assigns, shall and will at any time after such payments shall have been so made as aforesaid, upon the request and at the proper charges of the said A. B. and C. D., or either of them, their or either of their heirs or assigns, or any other person or persons interested in the equity of redemption of the said premises, re-convey the said manors, hereditaments, and premises, firstly hereinbefore mentioned and hereby appointed, or expressed and intended so to be, with their appurtenances, to the uses and upon the trusts, to and upon which the equity of redemption of the same premises shall, for the time being, stand limited and settled, and re-convey the said castle, park, messuages, lands, and other hereditaments secondly hereinbefore mentioned, and hereby granted and released, or expressed and intended so to be, with their appurtenances, unto the said A. B., his heirs or assigns, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said E. F., G. H., I. K., and L. M., or any of them, their or any of their heirs, executors, administrators, or assigns, so as for the doing thereof the said E. F., G. H., I. K., and L. M., or any of them, their or any of their heirs, executors, administrators, or assigns, be not compelled or obliged to go or travel from the place or places of their usual abode or dwelling: AND THE SAID A. B. and C. D. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant with the said E. F. and G. H., their executors and administrators, by these

SETTLED LAND TO TWO SETS OF MORTGAGEES.

Joint and several covenant for payment of one loan and interest.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

presents, that they the said A. B. and C. D., or one of them, their or one of their heirs, executors, or administrators, shall and will pay, or cause to be paid unto the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the aforesaid sum of £46,800, in the parts, shares, and proportions, and on or at the days or times in the aforesaid proviso mentioned or appointed for payment thereof, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents; and in case the said principal sum of £45,000, shall not be paid at the time hereinbefore mentioned or appointed for payment thereof, shall and will during so long as the said sum of £45,000, or any part thereof, shall remain on the security of these presents, pay or cause to be paid to the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, interest for the said sum of £45,000, or for so much thereof as for the time being shall remain unpaid, after the rate of £4 per cent. per annum, by equal half-yearly payments on the —— day of —— and the —— day of ——, in every year; [*similar covenants by* A. B. *and* C. D. *with* I. K. *and* L. M., *their executors and administrators, for payment of the* £15,000 *and interest*]: AND THE SAID A. B. and C. D. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant with the said E. F., G. H., I. K., and L. M., their heirs and assigns, by these presents, [*that the power is in force, supra, p.* 472;—*that* A. B. *is seised in fee of the hereditaments and premises,* "secondly hereinbefore particularly mentioned, and hereinbefore granted and released, or expressed and intended so to be," *supra, p.* 484;—*for right to appoint and release the hereditaments and premises,* "respectively" *appointed and released, supra, p.* 484;—*for quiet enjoyment after default in payment of the sums of* £46,800 *and* £15,600, *or either of them, supra, p.* 484;—*free from incumbrances—and for further assurance, supra, p.* 485: PROVIDED ALWAYS, and it is hereby agreed, and declared between and by the parties to these presents

—and of the other loan and interest.

Joint and several covenants for title.

Proviso for quiet enjoyment, by the

and the true intent of them and of these presents nevertheless is, that it shall be lawful for the said A. B., his heirs and assigns, or other the person or persons for the time being entitled to the equity of redemption of the said premises respectively, peaceably and quietly to have, hold, occupy, and enjoy all the said manors, castle, park, hereditaments, and premises, hereinbefore respectively appointed and granted and released, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sums of £46,800 and £15,600, or one of them, or some part thereof respectively, contrary to the aforesaid proviso and covenants for payment of the same respectively, and the true intent and meaning of these presents without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said E. F., G. H., I. K., and L. M., or any of them, their or any of their heirs or assigns, or any other person or persons whomsoever, lawfully claiming or to claim by, from, or under them or any of them: AND IT IS HEREBY agreed and declared between and by the parties to these presents, that if default shall be made in payment of the said principal sums of £45,000 and £15,000 respectively, or the interest thereon respectively, or any part of the said principal sums and interest respectively, at the times hereinbefore appointed for the payment of the same respectively, it shall be lawful for the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, or for the said I. K. and L. M., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, (as the case may be) (*b*), at any time or times after such default shall

SETTLED LAND TO TWO SETS OF MORTGAGEES.

mortgagor until default.

Power of sale.

(*b*) It is extremely difficult in mortgages of this kind to frame a convenient and efficacious power of sale. The power is sometimes given to all the mortgagees, and the survivors and survivor of them, and the heirs of such survivor, their or his assigns, so as to make the power run with the land; but it may occasion inconvenience to give the power to the heirs of the survivor, since those heirs may be infants or may be unknown.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

have been so made, [*proceed as in common power, supra, p.* 486, *inserting in a parenthesis,* "and as to the said premises comprised in the said subsisting mortgages, either discharged therefrom or subject thereto, or any of them"], and that for the purposes aforesaid, or any of them, it shall be lawful for the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, or for the said I. K. and L. M., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, (as the case may be), to make and execute, or cause to be made and executed all such agreements, deeds, conveyances, and assurances, as they or he shall think fit: AND IT IS HEREBY AGREED and declared, that upon any sale or sales which shall be made under the said power of sale, the said E. F., G. H., I. K., and L. M., or the survivors or survivor of them, or the heirs of such survivor, their or his assigns, or any other person or persons in whom the legal estate of the same premises may be vested, shall make such conveyances and assurances of the same for the purpose of carrying the sale thereof into effect as the person or persons by whom the sale shall be made shall direct: PROVIDED ALWAYS, and it is hereby agreed and declared, that no person or persons shall execute the power of sale hereinbefore contained, unless they or he shall have previously left at the office of ——, in —— (*c*),

Persons having the legal estate to convey as directed by the donees of the power.

Power not to be exercised till certain events have happened.

And it is certainly desirable, that each set of mortgagees should have a power of sale independent of the other, and this is the aim of the form in the text. The language, however, of the precedent, does not seem to be so distinct as is desirable. The introduction of two separate powers of sale, each complete in itself, would be effective, but would so greatly increase the length of the deed that it could not be justified without evident necessity.

(*c*) The precedent departs from the usual form in not mentioning any person to whom the notice may be delivered. This happens from part of the mortgaged estates being in settlement, which would occasion some difficulty in pointing out the persons to whom the notice should be given. Sometimes the notice is directed to be addressed "to the persons or person for the time being entitled to the equity of redemption of the said premises."

SETTLED LAND TO TWO SETS OF MORTGAGEES.

a notice in writing for the person or persons for the time being entitled to the equity of redemption of the said premises, to pay off the monies which for the time being shall be due on the security of these presents, and default shall have been made in payment of such monies or some part thereof for the space of six calendar months, to be computed from the time of leaving such notice, or unless and until some half-yearly payment of interest, which shall become due on the security of these presents to the persons or person executing the said power of sale, or a part of some such half-yearly payment shall have become in arrear for the space of three calendar months after the day on which the same shall become due: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made under the aforesaid power in that behalf, the purchaser or purchasers thereat shall not be bound to see or inquire, whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any money remains due on the security of these presents, or otherwise as to the propriety or regularity of such sale, and notwithstanding any irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers thereat, be deemed and taken to be within the aforesaid power in that behalf, and to be valid and effectual accordingly, and the remedy of the said A. B., his heirs or assigns, or of the said C. D., or any other person or persons interested in the equity of redemption of the said premises, in respect of any breach of the clause or provision lastly hereinbefore contained, shall be in damages only: AND IT IS HEREBY also agreed and declared, that, upon any such sale as aforesaid, the receipt or receipts in writing of the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, or of the said I. K. and L. M., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, (as the case may be), for the purchase-money of the premises to be sold, shall be an effectual discharge or effectual discharges to the purchaser or purchasers for the money therein respectively expressed to be received,

Purchasers not to be bound to see that events have happened.

Receipts of mortgagees to be good discharges.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

Trusts of purchase-money.

and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, or be answerable for any loss, mis-application, or non-application thereof: AND IT IS HEREBY further agreed and declared, that the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, and the said I. K. and L. M., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, as the case may be, shall hold all and singular the monies which shall arise from any sale which shall be made as aforesaid upon the trusts following, (that is to say), upon trust in the first place, by, with, or out of the same monies to reimburse themselves or himself, or pay or discharge, all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto; and in the next place upon trust, by and out of the monies which shall arise by sale or otherwise from the said castle, park, hereditaments, and premises hereinbefore granted and released, or intended so to be, to pay the said subsisting mortgages of £10,000, £12,000 and £5,000, or so much as shall remain due thereon respectively in case the same premises shall be sold discharged from such mortgages; and upon trust in the next place, by and out of the monies to arise by any such sale or sales of the said manors, castle, park, messuages, farms, lands, hereditaments, and premises hereinbefore appointed, and granted and released respectively, or expressed and intended so to be, to pay, retain, or satisfy to the person or persons respectively entitled thereto, the said sums of £45,000 and £15,000, intended to be hereby secured, and the interest thereon respectively, or so much thereof respectively as shall remain due or owing, pari passu, and without preference or priority; and upon trust to render and pay the surplus (if any) of the said monies to arise by any such sale or sales of the said castle, park, messuages, lands, and other hereditaments hereinbefore granted and released, or intended so to be, unto the said A. B., his heirs or assigns, and to pay the surplus

(if any) of the said monies to arise by sale of the said manors, messuages, farms, lands, and other hereditaments hereby limited and appointed as aforesaid, unto the said X. and Y., or the survivor of them, or the executors or administrators of such survivor, to be by them or him held and applied upon the trusts and in manner hereinafter mentioned or referred to; AND IT IS HEREBY also agreed and declared, that the aforesaid power of sale shall or may be exercised by any person or persons, who for the time being shall be entitled to receive and give a discharge for any of the monies, which for the time being shall be due on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said E. F. and G. H., or either of them, their or either of their executors, administrators, or assigns, or the said I. K. and L. M. or either of them, their or either of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the execution of the aforesaid powers or trusts or any of them: PROVIDED ALSO, and it is hereby agreed and declared, that the aforesaid power of sale, or anything herein contained, shall not in anywise prejudice or affect the right to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being: PROVIDED ALWAYS, and it is hereby agreed between and by the said A. B. and C. D., that, as between the said A. B., his heirs, executors, and administrators, and the said C. D., his heirs, executors, and administrators, the said A. B., his heirs, executors, and administrators shall be primarily liable to the payment of the said sums of £45,000 and £15,000 and interest, and that as between the said A. B., his heirs, executors, and administrators, and the person or persons for the time being entitled to the equity of redemption of the said mortgaged premises, the said mortgaged premises shall be the primary fund for the payment of the said sums of £45,000 and £15,000, and the interest thereon respectively; and that as between the said castle, park, messuages, lands, and other hereditaments hereinbefore granted and released, or intended so to be, and

SETTLED LAND TO TWO SETS OF MORTGAGEES.

Power of sale may be exercised by any person capable of giving a receipt for the purchase-money.

Mortgagees not to be answerable for involuntary losses.

Power of sale not to affect the right of foreclosure.

Agreement between the mortgagors as to the order of liability of themselves and the estates.

SETTLED LAND TO TWO SETS OF MORTGAGEES.

the said manors, messuages, farms, lands, and other hereditaments hereinbefore appointed, or intended so to be, the said castle, park, messuages, lands, and other hereditaments, hereinbefore granted and released, or intended so to be, shall be the primary fund for payment of the said sums of £45,000 and £15,000, and the interest thereon respectively (*d*): PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the provisions hereinbefore contained with respect to the primary liability to the payment of the said sums of £45,000 and £15,000 and interest, shall not be construed to affect the persons for the time being respectively entitled to the said sums of £45,000 and £15,000 and interest, or to prevent them from resorting to the said A. B., his heirs, executors, or administrators, and the said C. D., his heirs, executors, or administrators, or any of them, and to the said mortgaged premises or any of them, at the same time, or in such order as they shall think fit. [*Power to X. and Y. and the survivor of them, and the executors and administrators of such survivor, to give receipts, supra, p. 293, and to lay out the money to be paid to them or him in the purchase of lands to be settled to the uses of the deed of the 26th of November, 1832, and to invest the same in the meantime, and pay dividends as rent. See the subsequent volume of this work, Title* SETTLEMENTS.—*Power to A. B. and C. D., and the survivor, and the executors or administrators of the survivor, to appoint new trustees in the room of X. and Y., supra, p. 294, and infra, Title* SETTLEMENTS.—*Usual clauses for the indemnity and reimbursement of trustees, supra, p. 294, and infra, Title* SETTLEMENTS.] IN WITNESS &c.

The preceding agreement not to affect mortgagees.

Clauses relating to the surplus purchase-monies of the settled estates.

(*d*) Where two estates are mortgaged together, or two persons having distinct interests in an estate join in a mortgage, the order in which the estates and the mortgagors are to be primarily liable should always be declared in the mortgage-deed, so as to prevent disputes on the subject. Of course, however, the mortgagees should be excluded from any connection with this declaration, by the insertion of an express proviso to that effect.

LVIII.

LEASEHOLDS.

MORTGAGE *of* LEASEHOLDS *by way of* UNDERLEASE (*a*), *part of the Money having been previously advanced on a Deposit of the Title-deeds during the Investigation of the Title.* POWER *of* SALE, *with Declaration of Trust of the* REVERSION *which remains in the Mortgagor.*

THIS INDENTURE, made &c. BETWEEN A. B. and C. D., of &c., [*mortgagors*], of the one part, and E. F., of

Parties.

(*a*) An assignee of a lease is liable to the payment of the rent reserved, and the performance of the covenants contained in the lease, although he do not enter on the premises, (supra, p. 338, n. (*h*); 1 Wms. Saund. 241 *a*, n. (16)). And although it was once held, that this did not apply to an assignee upon mortgage, (*Eaton* v. *Jacques*, 2 Doug. 444); yet it is now well settled, that a mortgagee who takes an assignment of a lease by way of mortgage, although he never enters upon or takes possession of the property, becomes liable to the rent and covenants of the lease. (*Williams* v. *Bosanquet*, 1 Brod. & Bing. 238). Hence, in framing a mortgage of leasehold property, it becomes necessary to consider whether the rent and covenants are of such an amount and nature, as to render the liability to them a serious incumbrance. If the rent be trifling, and the covenants not of a kind likely to be burdensome, the mortgage should be made by assignment, because it is expedient that the mortgagee should have the whole legal interest rather than a mere derivative estate. It is expedient, both for the purpose of a sale and because it precludes the mortgagor from forfeiting, or doing other mischief, with the nominal reversion which is left in him by an underlease. If, however, the rent be large, or the covenants of formidable liability, the mortgage must be made by underlease. The mortgagee will not then be liable to the superior landlord in respect of the rent or covenants of the original lease; (*Holford* v. *Hatch*, 1 Doug. 183; *Earl of Derby* v. *Taylor*, 1 East, 502); although, of course, the chattels on the property will be liable to distraint. The risk, that the mortgagor may, by means of the nominal reversion left

Comparative advantages of a mortgage by underlease and assignment.

LEASEHOLDS.

&c., [*mortgagee*], of the other part, [*Recites a lease of the 14th day of February, 1760, for 999 years, and another lease of the 13th day of July, 1765, for the term of 993 years; see the mode of recital, supra, p. 340*]: AND WHEREAS, by divers mesne assignments and acts in the law, and ultimately, by an indenture bearing date the —— day of ——, and made, or expressed to be made, between [*parties*], the said hereditaments and premises comprised in the said indenture of the 14th day of February, 1760, were assigned to the said A. B. and C. D., their executors, administrators, and assigns, in equal shares as tenants in common, for the residue then to come of the said term of 999 years, at the rent and subject to the covenants and agreements in the said indenture of the 14th day of February, 1760, reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed and performed; [*similar recital as to the term of 993 years*]: AND WHEREAS, by an indenture bearing date the 28th day of April, 1838, and made, or expressed to be made, between the said A. B. and C. D. of the one part, and the said E. F. of the other part(*b*): AFTER RECITING THAT the said A. B. and C. D. were entitled to all that messuage or tenement and premises, situate and being in ——, for all the residue of the said term of 999 years thereof, granted by the said indenture of the 14th day of February, 1760, and to all that messuage or tenement and premises, situate and being in ——, for all the residue of the said term of 993 years thereof, granted by the said indenture of the 13th day of July, 1765, and also to a messuage or tenement and premises, situate and being in ——, for all the residue of a term of thirty years wanting three days thereof, granted by an indenture of

Recital of leases.

Of their having vested in the mortgagors.

Recital of an equitable mortgage, by deposit of the title-deeds of the recited leases, and of an underlease belonging to the mortgagors in other property.

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in him, cause a forfeiture of his term must be undergone; but the difficulty with regard to a sale may be removed by the introduction into the power of sale, of a special clause. (See, infra, p. 549). The precedent in the text may be easily adapted to the case of a mortgage by assignment; and a precedent of such a mortgage, (united with a mortgage of freeholds), may be seen, infra, Precedent LIX. p. 550.

(*b*) With regard to equitable mortgages, see supra, p. 156.

underlease bearing date the 24th day of June, 1835: AND AFTER RECITING THAT the said A. B. and C. D., having occasion for the sum of £1,000, had requested the said E. F. to advance and lend them the same upon the security of a mortgage of the said several messuages or tenements and premises, thereinbefore mentioned: AND AFTER RECITING THAT the title of the said A. B. and C. D. to the said several messuages or tenements and premises was then in course of investigation on behalf of the said E. F., and that the said premises in —— and —— were let at rents to a considerable amount, and the premises in ——, were about being let at a considerable rent: AND AFTER RECITING THAT the said A. B. and C. D. having immediate occasion for the sum of £800, part of the said sum of £1,000, had applied to and requested the said E. F. to advance them the same, which the said E. F. had agreed to do; and that it had also been agreed that the repayment of the said sum of £800 should be secured in the meantime, with interest after the rate of £5 per cent. per annum, by the said indenture now in recital, and by a deposit of the title-deeds mentioned in the schedule thereunder written or thereunto annexed, (being the title-deeds of the said several leasehold premises): AND AFTER RECITING THAT, in pursuance of the said agreement, the said A. B. and C. D. had, before the date and execution of the said indenture now in recital, deposited the said deeds and writings in the hands of the said E. F.: IT WAS BY THE SAID INDENTURE NOW IN RECITAL WITNESSED, that, in consideration of the sum of £800 to the said A. B. and C. D. paid by the said E. F., the said A. B. and C. D. did for themselves, their heirs, executors, and administrators, and each of them did for himself, his heirs, executors, and administrators, covenant with the said E. F., his executors, and administrators, that, in case a legal mortgage should not have been made and completed to the said E. F. in the meantime, they, their heirs, executors, or administrators, would at any time after the —— day of ——last, on demand, pay to the said E. F., his executors, administrators, or assigns, the sum of £800, with interest thereon from the date of the said indenture now in recital, after the rate of £5 per cent.

LEASEHOLDS.

per annum, and that they, their executors or administrators would, before the said —— day of —— last, deduce a good and marketable title to the said several messuages or tenements, and premises, for all the residue of the said several terms therein, subject only to the payment of the several rents reserved by the said several indentures of lease, and the covenants and agreements therein respectively contained; and that they, their executors and administrators, and all other necessary parties, would on the said —— day of —— last, or at such earlier period as should be agreed on, at the costs and charges of them the said A. B. and C. D., their executors and administrators, demise unto the said E. F., his executors, administrators, and assigns, free from incumbrances, (except as aforesaid), the said several messuages or tenements and premises, with their rights, members, and appurtenances, for all the residue of the said several terms therein, (leaving a reversion in the mortgagors of one day), for securing the repayment of the said sum of £1,000, with interest for the same at the rate of £5 per cent. per annum, and that such mortgage should contain such provisions as the counsel of the said E. F. should think suitable, in the case of a mortgage by way of underlease, including powers of sale and insurance of the said premises against loss or damage by fire: AND WHEREAS the said term of thirty years wanting three days, granted by the said indenture of the 24th day of June, 1835, was, after the date and execution of the said indenture of the 28th day of April, 1838, surrendered to M. N. and P. Q., the lessors, by whom the same was granted, in order to enable them to obtain a new lease of the premises comprised in the same term: AND WHEREAS the said M. N. and P. Q. afterwards obtained a new lease of the same premises, and by an indenture bearing date the 23rd day of June, 1838, and made, or expressed to be made, between the said M. N. and P. Q. of the one part, and the said A. B. and C. D. of the other part, demised unto the said A. B. and C. D., their executors, administrators, and assigns, all that the said messuage or tenement, situate and being in —— street, and numbered ——, in the county of ——, and late in the occupation of

—of a surrender of the underlease, in order that the original lease might be renewed.

—of grant of new underlease to mortgagor.

the said M. N. and P. Q., and now of ——, with the rights, easements, and appurtenances thereunto belonging, to hold the same unto the said A. B. and C. D., their executors, administrators, and assigns, from the day of the date of the said indenture now in recital, for the term of twenty-seven years wanting three days, at the yearly rent of £——, and under and subject to the covenants and agreements in the said indenture now in recital contained, and on the part of the lessees, their executors, administrators, and assigns, to be observed and performed: AND WHEREAS the title of the said A. B. and C. D. to the said several messuages or tenements and premises, hereinbefore particularly mentioned, has been approved of on behalf of the said A. B., and the said premises in —— are now let at a considerable rent; AND WHEREAS the said sum of £800 still remains due and owing upon the security of the said indenture of the 28th day of April, 1838, but all interest thereon has been paid up to the day of the date of these presents (*c*): AND WHEREAS the said E. F. has agreed, upon the request of the said A. B. and C. D., to advance them the further sum of £200, (being the remainder, after the advance of the said sum of £800 as aforesaid, of the said sum of £1,000,) upon having the repayment of the said sum of £1,000, with interest thereon after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned (*d*): NOW THIS INDENTURE WITNESS-

LEASEHOLDS.

—of the mortgagors' title having been approved.

—of the original advance being due.

—of the agreement for completing the advance.

Witnesseth.

(*c*) Where a partial advance has been made before the execution of the mortgage, the interest on this advance must be paid up to the date of the mortgage, so that all the principal sums may be consolidated into one entire mortgage-debt, on which interest may be computed from the date of the mortgage. Unless this arrangement be made, and the necessary recital introduced, it will be found extremely difficult to frame the proviso for redemption, and the covenant for the payment of the mortgage-money and interest. The remark applies *à fortiori*, if there be several prior debts or accounts subsisting between the mortgagor and mortgagee.

Interest on prior advance should be paid up.

(*d*) It is evident that, by omitting the recitals relative to the prior transactions between the mortgagor and mortgagee, and introducing the common recital of the agreement for the loan, the precedent in the text may be adapted to the case of a mortgage under ordinary circumstances.

LEASEHOLDS.

ETH, that, in pursuance of the said covenant in this behalf contained in the said indenture of the 28th day of April, 1838, and of the agreement hereinbefore contained,

Consideration.

and in consideration of the said sum of £800, so paid by the said E. F. to the said A. B. and C. D. as aforesaid, and of the said further sum of £200, paid by the said E. F. to the said A. B. and C. D., at or immediately before the

Receipt.

sealing and delivery of these presents, (the receipt of which said sums of £800 and £200, making together the said sum of £1,000, they, the said A. B. and C. D., do hereby acknowledge, and of and from the same and every part thereof do, and each of them doth, acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns for ever, by these presents),

Demise.

They, the said A. B. and C. D., have, and each of them hath demised and leased, and by these presents do, and each of them doth, demise and lease unto the said E. F., his

Parcels.

executors, administrators, and assigns, ALL THAT piece or parcel of ground, and the messuage or tenement erected and standing thereon, and now known as number —, in —— aforesaid, and all and singular other the hereditaments and premises by the said indenture of the 14th day of February, 1760, demised, or expressed to be demised as aforesaid: AND ALSO all that piece or parcel of ground in —— aforesaid, and the messuage or tenement erected and standing thereon, and all and singular other the hereditaments and premises by the said indenture of the 13th day of July, 1765, demised, or expressed to be demised as aforesaid: AND ALSO all that the said messuage or tenement, situate and being, and numbered ——, in —— street aforesaid, and all and singular other the hereditaments and premises by the said indenture of the 23rd day of June, 1838, demised, or expressed to be demised as aforesaid: AND ALL and singular the rights, easements, and appurtenances to the said pieces or parcels of ground, messuages, or tenements,

Habendum.

respectively belonging (*e*): TO HAVE AND TO HOLD the said

The clause "All the estate, &c." not

(*e*) It is usual to omit the clause of "All the estate, &c." in demises by tenants for years, on the ground, that, if such clause be inserted, the whole estate passes, and cannot be abridged by the habendum. That is

LEASEHOLDS.

pieces or parcels of ground, messuages, or tenements, and all and singular other the premises, hereinbefore demised or expressed and intended so to be, unto the said E. F., his executors, administrators, and assigns, as to such part of the said premises as were comprised in the said indenture of the 14th day of February, 1760, for all the residue now to come of the said term of 999 years thereby granted, wanting one day of the same term, and as to such part of the said premises as were comprised in the said indenture of the 13th day of July, 1765, for all the residue now to come of the said term of 993 years thereby granted, wanting one day of the same term, and as to such part of the said premises as were comprised in the said indenture of the 23rd day of June, 1838, for all the residue now to come of the said term of twenty-seven years wanting three days, thereby granted, except the last day of the same term, and as to all and singular the said premises, hereinbefore demised, or

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inserted in underleases.

to say, the intended demise becomes in fact an assignment of the whole term. The authorities usually quoted for this doctrine are—Co. Litt. 299. a.; *Griffin's case*, 2 Leon. 78; *Lilley* v. *Whitney*, Dyer, 272, pl. 30; *Goshawke* v. *Chigwell*, Cro. Car. 154; S. C. Jones, 205; *Germain* v. *Orchard*, 1 Salk. 346. But it cannot be said, that they bear out the position for which they are cited. In *Griffin's* or rather *Wynnybank's case*, the point in dispute was altogether different; and it does not even appear that there was any habendum; and, in the other cases, there was no express decision as to the point discussed in this note; it can only be deduced from them by argument. It is perfectly clear, that if the estate of the grantor be freehold, (as in the case of a lease for lives), the insertion of the clause of "All the estate," &c., does not destroy the operation of the habendum in abridging the estate granted by the premises; for if it were so, as the freehold could not pass by the deed, the grantee would take no estate at all. (*Earl of Derby* v. *Taylor*, 1 East, 502). And it is equally clear, that, notwithstanding the assertion in Co. Litt. 299. a., there are several cases where the habendum is allowed to abridge or qualify the premises. (Co. Litt. 183. a.; Com. Dig. tit. xxxii, Ch. 21, s. 79, et seq.) It may, perhaps, be prudent to omit the clause of "All the estate," &c., in underleases, especially as no apparent good is obtained by the insertion of it; but, (to say the least), it is probable, that in modern construction that clause would be held to be explained by the habendum. See, further, on the subject of habendums in leases, *Strickland* v. *Maxwell*, 2 Mee. & Wels. 539.

LEASEHOLDS.

Proviso for redemption.

expressed and intended so to be, subject to the proviso for redemption hereinafter contained, (that is to say), PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B. and C. D., their executors, administrators, or assigns, shall and do pay or cause to be paid to the said E. F., his executors, administrators, or assigns, the sum of £1,000, and the sum of £50 as and for one year's interest for the same at the rate of £5 for £100 for a year, making together the sum of £1,050, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £25, being half-a-year's interest for the said sum of £1,000 at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £1,025, residue thereof, being the whole of the said principal sum of £1,000 and another half-year's interest for the same, at the rate aforesaid, on the —— day of —— then next following, which will be in the year ——, without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, or any other cause, matter, or thing whatsoever (*f*), then and in such case he the said E. F., his executors, administrators, or assigns, shall and will, at any time after such payment shall have been so made as aforesaid, upon the request and at the proper costs and charges of the said A. B. and C. D., their executors, administrators, or assigns, surrender or assign the said hereditaments and premises hereby demised and leased, or expressed and intended so to be, unto the said A. B. and C. D., their executors, administrators, and assigns, or as they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said E. F., his executors, administrators, or assigns, or any of them, so as for the doing thereof the said E. F., his executors, administrators, or assigns, or any of them, be not

(*f*) See supra, p. 467, n. (*h*).

compelled or obliged to go to or travel from the place or places of his, their, or any of their usual abode or dwelling: AND THE SAID A. B. and C. D. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators (*g*), covenant with the said E. F., his executors and administrators, by these presents, that they the said A. B. and C. D., their heirs, executors, or administrators, shall and &c. [*covenant for payment of mortgage-money and interest, supra, p.* 469]: AND THE SAID A. B. and C. D. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant with the said E. F., his executors, administrators, and assigns, by these presents, in manner following, (that is to say), THAT the said several indentures of the 14th day of February, 1760, the 13th day of July, 1765, and the 23rd day of June, 1838, respectively, are, at the time of the sealing and delivery of these presents, good, valid, and effectual leases in the law of the said hereditaments and premises therein respectively comprised, and that the same respectively are now in full force, unforfeited and unsurrendered, and in nowise become void or voidable: AND ALSO THAT all and singular the rents, covenants, and agreements, in and by the said indentures of the 14th day of February, 1760, the 13th day of July, 1765, and the 23rd day of June, 1838, respectively reserved and contained, and on the part of the several lessees therein respectively named, their respective executors, administrators, and assigns, to be paid, observed, and performed, have been paid, observed, and performed, up to the day of the date of these presents: AND ALSO

Covenant for payment of mortgage-money and interest.

Covenants that the leases are good.

—that the rents and covenants have been paid and performed.

—for right to demise.

(*g*) When the mortgagors are more than one in number, the mortgage covenants are joint and several: there can be no doubt that this is correct, so far as relates to the covenant for payment of the mortgage-money, and to the other covenants during the continuance of the mortgage; because the mortgagee ought to have every facility for obtaining payment of the mortgage-money and interest. But these covenants are not suited to the circumstances which take place after a foreclosure or sale. (See supra, p. 471, n. (*e*).

Mortgage covenants.

LEASEHOLDS. THAT they the said A. B. and C. D. now have in themselves good right, full power, and lawful and absolute authority to demise the said several hereditaments and premises hereinbefore demised, or expressed and intended so to be, for the several terms hereinbefore granted of the same respectively, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO THAT if default shall be made in payment of the said sum of £1,050, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said E. F., his executors, administrators, and assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore demised, or expressed and intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth during the continuance of the several terms, hereinbefore respectively granted or expressed, and intended so to be, peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof to and for his and their own use, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B. and C. D., or either of them, their or either of their executors, administrators, or assigns, or any other person or persons whatsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have, or lawfully or equitably claim, in or to the said hereditaments and premises, or any of them, or any part or parts thereof: AND THAT, free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise by the said A. B. and C. D., their executors or administrators, saved, protected, kept harmless, and indemnified, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever: AND MOREOVER, THAT they the said A. B. and C. D., and each of them, their and each of their executors and administrators, and all and every other persons and person whosoever, having, or lawfully or equitably claim-

—for quiet enjoyment after default.

—free from incumbrances;

—for further assurance;

ing, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, of, in, or to the said hereditaments and premises hereinbefore demised, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time and at all times hereafter, upon the request of the said E. F., his executors, administrators, or assigns, but at the costs and charges of the said A. B. and C. D., or one of them, their or one of their executors or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, demises, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely demising and assuring all the said hereditaments and premises hereinbefore demised, or expressed and intended so to be, unto the said E. F., his executors, administrators, and assigns, for the several terms hereinbefore respectively granted thereof, or expressed and intended so to be, as by the said E. F., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required: AND THAT they the said A. B. and C. D., their executors, administrators, or assigns, or some of them, shall and will from time to time, and at all times, so long as the said principal sum of £1,000 and the interest thereon, or any part of the said principal money or interest respectively, shall remain on the security of these presents, pay, observe, and perform, or cause to be paid, observed, and performed, all and singular the rents, covenants, and agreements, in and by the said indentures of the 14th day of February, 1760, the 13th day of July, 1765, and the 23rd day of June, 1838, respectively reserved and contained, and on the part of the several lessees therein respectively named, their respective executors, administrators, and assigns, to be paid, observed, and performed: AND SHALL AND WILL save, defend, keep harmless, and indemnified the said E. F., his executors, administrators, and assigns, and every of them, of, from, and against all actions, suits, proceedings, costs, charges, damages, and expenses whatsoever, (if any), which

LEASEHOLDS.

—and that, during the security the rents and covenants shall be paid and performed.

—and the mortgagee indemnified.

LEASEHOLDS.

shall or may be incurred or sustained by reason or on account of the non-payment or non-performance of the same respectively, or any act, matter, or thing whatsoever, touching or concerning the same respectively (*h*): PROVIDED ALSO, and it is hereby agreed and declared between and by the said parties to these presents, and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B. and C. D., their executors, administrators, and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises hereinbefore demised, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof, to their own use, until default shall be made in payment of the said sum of £1,050, or some part thereof, contrary to the aforesaid proviso or covenant for payment of the same and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said E. F., his executors, administrators, or assigns, or any other person or persons whomsoever, lawfully claiming or to claim by, from, or under him, them, or any of them, [*covenants for insurance, supra, p.* 514, *and infra, Precedent LXXIV.*] (*i*): AND IT IS HEREBY further provided and declared, that if default shall be made in payment of the said principal sum of £1,000, or the interest thereon, or any part thereof respectively, at the times hereinbefore

Proviso for quiet enjoyment until default.

Power of sale.

(*h*) As to the intention and effect of this and the preceding covenant, see supra, p. 389, n. (*l*).

Covenants for insurance of leaseholds.

(*i*) In framing covenants relating to insurance of leasehold property, care must be taken that the stipulations are not repugnant to any covenants for insurance which are contained in the original lease. As for instance, if the covenant in the lease be to insure in the name of the lessor, it must not be stipulated that the mortgage insurance shall be in the name of the mortgagee, for if it were so, the mortgagor would be obliged to keep up two insurances instead of one. It is not right, however, for the mortgagee to rely on the covenant in the original lease; he should insist on having a covenant for insurance on which he can himself sue.

appointed for the payment of the same respectively, it shall be lawful for the said E. F., his executors, administrators, or assigns, at any time or times after such default shall have been so made, without any further consent on the part of the said A. B. and C. D., or either of them, their or either of their executors, administrators, or assigns, to make sale and dispose of the said messuages, buildings, and other hereditaments and premises hereinbefore demised, or expressed so to be, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, with full power upon any such sale or sales to make any stipulations as to title or otherwise, which he or they shall deem necessary, and also with full power to buy in the premises, or any part thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises, or any part thereof, and to re-sell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby, and that for the purposes aforesaid, or any of them, it shall be lawful for the said E. F., his executors, administrators, or assigns, to make and execute, or cause to be made and executed all such agreements, deeds, assignments, and assurances, as he the said E. F., his executors, administrators, and assigns, shall think fit: AND THAT after any sale or sales shall have been made under the said power of sale by the said E. F., his executors, administrators, or assigns, they the said A. B. and C. D., their executors, administrators, and assigns, shall and will stand possessed of and interested in the said one day, of the said terms of 999 years, 993 years, and 27 years, wanting three days respectively, left in the said A. B. and C. D. by way of reversion, as hereinbefore is mentioned, upon trust for the purchaser or purchasers of the premises comprised in the same terms respectively, and to assign and dispose of the same as such purchaser or purchasers shall direct, but so nevertheless that the said E. F., his executors or administrators, or his assigns, (other than

After a sale, mortgagors to hold the reversion in trust for purchaser.

LEASEHOLDS.

and except such assigns as shall have been purchasers under the aforesaid power of sale), shall not be entitled to call for an assignment of the said reversions, or have any interest therein (*k*). [*Add the ordinary clauses in powers of sale, supra, p.* 476]. IN WITNESS &c.

LIX.

FREEHOLDS AND LEASEHOLDS.

MORTGAGE *of* FREEHOLDS *and* RENEWABLE LEASEHOLDS—PROVISO *for the* REDUCTION *of* INTEREST *on regular Payment.*

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the first part; C. D., of &c., and E. F., of &c., [*trustees for mortgagor*], of the second part; and G. H., of &c., [*mortgagee*], of the third part: WHEREAS M. N., late of &c., being seised of or entitled to the capital messuage or mansion-house, pieces or parcels of land, and other hereditaments, hereinafter particularly mentioned, and intended to be hereby released, with the appurtenances, for an estate of inheritance in fee-simple, and being also

Recital of a will devising in trust for mortgagor in tail male.

Provision, that in mortgages by underlease the reversion shall be held after a sale in trust for purchasers.

(*k*) The last stipulation is inserted with a view to meet the objection alluded to, *supra*, p. 537, n. (*a*), The effect of the clause will be, that after a sale, the mortgagor will hold the reversion in trust for the purchaser, and may be compelled to assign it to him. It will be seen, that the possibility of the clause giving the mortgagee himself an interest in the reversion is expressly negatived, in order to prevent the application of the supposed doctrine of the Courts of Equity, that a cestui que trust of a lease might be compelled to take an assignment of the legal interest in the lease so as to subject him to the burden of the rent and covenants. (*Lucas* v. *Comerford*, 3 Bro. C. C. 166; S. C. 1 Ves. Jun. 235; and 8 Sim. 499; *Flight* v. *Bentley*, 7 Sim. 149; *Jenkins* v. *Portman*, 1 Keen, 435). But the expressions negativing this possibility were rather inserted from abundant caution than as being essential, and the cases referred to have been recently overruled. (*Moores* v. *Choat*, 8 Sim. 508).

possessed of or entitled to the piece or parcel of ground and other hereditaments, hereinafter particularly mentioned, and intended to be hereby assigned, with the appurtenances for the residue then to come of a term of thirty-nine years, in and by an indenture bearing date the 20th day of December, 1783, granted of the same premises, with a covenant for perpetual renewal at the end of every fourteen years, similar to the covenant in that behalf hereinafter recited, duly made, signed, and published his last will and testament in writing, bearing date the 21st day of July, 1792, and thereby gave and devised the said freehold and leasehold hereditaments by the description of the messuage, &c., [*stating the description in the will*], unto the said C. D., (then ——), and to E. F. and I. K., their executors, administrators, and assigns, for the term of twenty-two years, to be computed from his death, upon certain trusts in the said will mentioned, with a proviso for cesser of the same term when his eldest son, the said A. B., should attain the age of twenty-one years, and from and after the determination of the said term, and subject thereto and to the trusts thereof unto his eldest son, the said A. B., (then ——), in tail male, with remainders over, and the said testator thereby appointed the said C. D., E. F., and I. K., executors of his said will: AND WHEREAS, by an indenture bearing date the 8th day of August, 1797, and made or expressed to be made between the mayor, commonalty, and citizens of the city of ——, of the first part; J. P., T. W., and C. W., (therein described as surviving trustees for the said mayor and commonalty and citizens of a certain piece of ground, formerly called ——), of the second part; and the said M. N. of the third part; the said J. P., T. W., and C. W., in consideration of the surrender of the said indenture of lease of the 20th day of December, 1783, and for the other considerations in the said indenture now in recital mentioned, did (by and with the privity and direction of the said mayor and commonalty and citizens,) demise and grant unto the said M. N., his executors, administrators, and assigns, the said leasehold piece or parcel of ground and other heredita-

FREEHOLDS AND LEASEHOLDS.

—of a renewal of the lease.

FREEHOLDS AND LEASEHOLDS.

ments, with the appurtenances, by the description of all that &c., [*parcels*](a), Together with all ways, &c., and also free liberty &c., [*general words as given in the lease*], To hold the same unto the said M. N., his executors, administrators, and assigns, from the Feast-day of the Blessed Virgin Mary then last past, for the term of thirty-nine years, at the yearly rent and under and subject to the covenants and agreements in and by the said indenture now in recital reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be paid, observed, and performed, with a covenant for perpetual renewal at the end of every fourteen years, similar to the covenant in that behalf hereinafter recited: AND WHEREAS the said M. N. duly made, signed, and published two codicils, bearing date respectively the —— day of ——, and the —— day of ——, to his said will, but did not by either of the said codicils alter or revoke the dispositions so as aforesaid made by his said will of the aforesaid freehold and leasehold hereditaments, or the aforesaid appointment of executors: AND WHEREAS the said M. N. died on the 16th day of August, 1802, without having revoked or altered his said will and codicils, except so far as the said will was altered or revoked by the said codicils, and soon after the decease of the said testator his said will and codicils were proved by the said C. D., E. F., and I. K. in the Prerogative Court of the Archbishop of Canterbury: AND WHEREAS the said A. B. attained his age of twenty-one years in or about the month of October, 1805: AND WHEREAS, by an indenture of release, bearing date the 10th day of February, 1808, grounded on a lease for a year, and

—of testator having made codicils.

—of death of testator, and probate of his will and codicils.

—of mortgagor having attained twenty-one.

—of conveyance by the mortgagor to

(a) It often becomes necessary, in dealing with leaseholds, to recite more than one lease in order to shew the equitable title to the extinct leases; (supra, p. 88, n. (b); and the authorities there cited). But in framing such recitals, the parcels should not be given at length more than once, unless the description of them in the different leases materially varies. It is not very important in which of the recited leases the parcels are set forth, but it is most usual to give them in the lease of latest date. It was probably the creation of the quasi entail which occasioned a departure from this rule in the precedent in the text.

made or expressed to be made between [*parties*] for the considerations therein mentioned, the said A. B. did grant, release, and confirm unto the said [*tenant to the præcipe*], his heirs and assigns, the said messuage or mansion-house and freehold pieces or parcels of land, and all and singular other the freehold hereditaments devised by the said will of the said M. N., with their appurtenances, to hold the same unto and to the use of the said [*tenant to the præcipe*], his heirs and assigns, to the intent that he might become immediate tenant of the actual freehold of the said hereditaments, to the end that one or more good and perfect common recovery or recoveries with double voucher, wherein the said —— might be demandant, the said —— tenant, and the said A. B. vouchee, might be had and suffered of the same hereditaments, and which said recovery or recoveries it was thereby declared should enure to the use of the said A. B., his heirs and assigns for ever: AND WHEREAS, in pursuance of the said lastly hereinbefore recited indenture, a common recovery with double voucher, wherein the said —— was demandant, the said —— tenant, and the said A. B. vouchee, was duly suffered in the Court of Common Pleas at Westminster in Hilary term, in the 48th year of the reign of his late Majesty King George the 3rd (*b*): AND WHEREAS, by an indenture bearing date the 8th day of August, 1809, and made or expressed to be made between the said mayor, commonalty, and citizens of the city of ——, of the first part; J. P. and S. T., (therein described to be the surviving trustees, for the said mayor and commonalty and citizens, of the said piece or parcel of ground formerly called ——), of the second part; and the said C. D., E. F., and I. K., of the third part; in consideration

FREEHOLDS AND LEASEHOLDS.

make a tenant to the præcipe, for suffering a recovery to enure to the use of mortgagor in fee.

—of recovery having been suffered.

—of renewal of lease.

(*b*) A. B., being tenant in tail of the freeholds, took an absolute interest in the leaseholds for years which were included in the same devise. For it is well settled, that where personal estate is given in terms which, applied to real estate, create an estate tail, the personal estate vests absolutely in the first tenant in tail. (Powell on Devises, by Jarman, vol. 2, ch. xxxiii. p. 632; see, further, on the subject of entails of terms of years, Fearne on Cont. Rem. 490 et seq.; Co. Lit. 20. a. n. 5, 290. b. n. (1), xii. See, too, infra, the Precedents of SETTLEMENTS AND WILLS).

Words which would create an estate tail in freeholds give the absolute interest in leaseholds.

FREEHOLDS AND LEASEHOLDS.

of the surrender of the said indenture of lease of the 8th day of August, 1797, and for the other considerations in the said indenture now in recital mentioned, the said J. P. and S. T. did (with the privity of and by the direction of the said mayor and commonalty and citizens) demise and grant unto the said C. D., E. F., and I. K., their executors, administrators, and assigns, the said piece or parcel of ground, hereditaments, and premises comprised in the said indenture of lease of the 8th day of August, 1797, with their appurtenances, to hold the same unto the said C. D., E. F., and I. K., their executors, administrators, and assigns, in trust as aforesaid, from the Feast-day of the Annunciation of the Blessed Virgin Mary then last past, for the term of forty-one years, at the yearly rent and under and subject to the covenants and agreements in and by the said indenture now in recital reserved and contained, and on the part of the lessees, their executors, administrators, and assigns, to be paid, observed, and performed. And in the said indenture now in recital is contained a covenant by the said mayor and commonalty and citizens, that they and their trustees for the time being would, at the request, costs, and charges of the said C. D., E. F., and I. K., their executors, administrators, or assigns, at the end of fourteen years, to be computed from the Feast-day of the Annunciation of the Blessed Virgin Mary then next ensuing, execute a new lease of the said thereby demised premises at the same rent and with and under the like covenants and agreements as were contained in the said indenture now in recital, unto the said C. D., E. F., and I. K., their executors, administrators, and assigns, for a term of forty years, to commence from the expiration of the said fourteen years, and so from time to time for ever at the end of every fourteen years, they paying for every such renewal into the chamber of the said city the sum of £—— by way of fine, and all arrears of rent, and executing a counterpart of such renewed lease: AND WHEREAS the said I. K. died since the date and execution of the said last-mentioned indenture: AND WHEREAS the said G. H. hath agreed to advance and lend to the said A. B. the sum of £1,000, upon having the repayment of the

—of death of one of the trustees.

—of agreement for mortgage.

same with interest after the rate hereinafter mentioned, secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £1,000 to the said A. B. paid by the said G. H., at or immediately before the sealing and delivery of these presents, (the receipt, &c., *supra, p.* 465), he the said A. B. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said G. H., (in his actual possession now being by virtue of a bargain and sale thereof to him made by the said A. B., &c., *supra, p.* 198), and his heirs, ALL THAT &c., (*freehold parcels and general words*): TO HAVE AND TO HOLD the said capital messuage or mansion-house, pieces or parcels of land and hereditaments, and all and singular other the premises hereby granted and released, or expressed and intended so to be, unto the said G. H., his heirs and assigns, to the use of the said G. H., his heirs and assigns for ever, subject nevertheless to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations aforesaid, they the said C. D. and E. F., at the request and by the direction of the said A. B., (testified by his being a party to and executing these presents), have and each of them hath assigned, and by these presents do and each of them doth assign, and the said A. B. hath assigned and confirmed, and by these presents doth assign and confirm unto the said G. H., his executors, administrators, and assigns, THE SAID piece or parcel of ground and hereditaments, and all and singular other the premises in and by the said indenture of the 8th day of August, 1809, demised, or expressed to be demised, unto the said C. D., E. F., and I. K., with their and every of their appurtenances, AND ALL the estate, &c.: TO HAVE AND TO HOLD the said piece or parcel of ground, and all and singular other the premises hereby assigned, or expressed and intended so to be, unto the said G. H., his executors, administrators, and assigns, henceforth for the residue now to come of the said term of forty-one years, subject nevertheless to the proviso for redemption herein-

FREEHOLDS AND LEASEHOLDS.

Witnesseth.

Consideration.

Conveyance of freehold.

Habendum.

Witnesseth further, assignment of leaseholds.

Parcels.

Habendum.

FREEHOLDS AND LEASEHOLDS.

Proviso for redemption.

after contained (*c*): PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B., his heirs, executors, administrators, and assigns, do and shall pay, or cause to be paid, unto the said G. H., his executors, administrators, or assigns, the sum of £1,000, and the sum of £50 as and for one year's interest for the same, at the rate of £5 for every £100 for a year, making together the sum of £1,050, in the parts, shares, or proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £25 part thereof, being half a year's interest for the said sum of £1,000 at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £1,025, residue thereof, being the whole of the said principal sum of £1,000 and another half-year's interest for the same at the rate aforesaid, on the —— day of —— then next following, which will be in the said year ——, without any deduction or abatement whatsoever out of the same or any part thereof, [for or in respect of any taxes, charges, rates, assessments, payments, or impositions whatsoever, taxed, charged, assessed, or imposed, or to be taxed, charged, assessed, or imposed on the said hereditaments and premises hereinbefore granted and released and assigned respectively, or expressed and intended so to be, or any of them, or upon the said sum of £1,050, or any part thereof, or upon the said G. H., his heirs, executors, administrators, or assigns, or any person or persons whomsoever, for, upon account, or in respect of the same hereditaments and premises, or any of them, or of the said sum of £1,050, or any part thereof, by authority of Parliament, or otherwise howsoever, or for, upon account, or in respect of any other matter, cause, or thing whatsoever (*d*)], then and in such case, he, the said

(*c*) As to the comparative advantages of a mortgage by underlease and assignment, and for a precedent of a mortgage by way of underlease, see supra, p. 537.

(*d*) The words in brackets are not essential. See supra, p. 467, n. (*k*), and p. 495.

FREEHOLDS AND LEASEHOLDS.

G. H., his heirs, executors, administrators, or assigns, shall and will at any time after such payment shall have been so made as aforesaid, upon the request and at the proper costs and charges of the said A. B., his heirs, executors, administrators, or assigns, re-convey the said capital messuage or mansion-house, pieces or parcels of ground, and other hereditaments and premises, hereinbefore granted and released, or expressed and intended so to be, unto the said A. B., his heirs or assigns, or as he or they shall in that behalf order or direct, and assign the said leasehold pieces or parcels of ground and other hereditaments and premises hereinbefore assigned, or expressed and intended so to be, unto the said A. B., his executors, administrators, or assigns, for the residue which shall be then unexpired of the said term of forty-one years, free from all incumbrances whatsoever, made, done, or committed by the said G. H., his heirs, executors, administrators, or assigns, or any of them, so as for the doing thereof the said G. H., his heirs, executors, administrators, or assigns, or any of them, be not compelled or obliged to go or travel from the place or places of his, their, or any of their usual abode or dwelling, [*covenant by A. B. with G. H., his executors, and administrators, for payment of the mortgage-money and interest, supra, p.* 469]: PROVIDED ALWAYS, and the said G. H. doth hereby for himself, his heirs, executors, and administrators, covenant with the said A. B., his executors, administrators, and assigns, and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B., his heirs, executors, administrators, or assigns, do and shall on the —— day of ——, and the —— day of —— in every year, so long as the said principal sum of £1,000 or any part thereof shall remain due or owing on the security of these presents, or within one calendar month next after each of the said days respectively, pay or cause to be paid unto the said G. H., his executors, administrators, or assigns, interest for the said sum of £1,000, or for so much thereof as shall for the time being remain due or owing as aforesaid, at the

Covenant for payment of mortgage-money and interest.

Proviso for reduction of interest on regular payment.

FREEHOLDS AND LEASEHOLDS.

rate of £4 per £100 for a year, then and in such case he the said G. H., his executors, administrators, or assigns, shall and will accept and take interest for the said sum of £1,000, or for so much thereof as shall for the time being remain due or owing as aforesaid, at the rate of £4 for £100 for a year, for every such half-year for which such interest shall be paid to him or them within such one calendar month as aforesaid: PROVIDED NEVERTHELESS, and it is hereby agreed and declared, that if at any time or times, whilst the said principal sum of £1,000 or any part thereof shall remain due or owing upon the security of these presents, the interest for the said sum of £1,000, or so much thereof as aforesaid shall be in arrear and unpaid for one calendar month and upwards next after any day whereon half-a-year's interest shall from time to time become due and payable, and the interest being so in arrear the said G. H., his executors, administrators, or assigns, shall nevertheless accept and take, in respect of such arrears of interest, any less sum than after the rate of £5 for £100 for a year, and if it shall happen that the interest for the said sum of £1,000, or any part thereof, shall at any subsequent time or times be in arrear or unpaid for the space of one calendar month next after any day whereon half-a-year's interest shall from time to time become due and payable, then and in such case the said G. H., his executors, administrators, or assigns, shall not by reason of his or their having at any previous time or times accepted or taken interest after any less rate than £5 for £100 for a year for the said sum of £1,000, or any part thereof, be prevented or precluded from demanding, recovering, and receiving of and from the said A. B., his heirs, executors, administrators, or assigns, interest for the said sum of £1,000, or for so much thereof as shall for the time being remain due or owing on the security of these presents at the rate of £5 for £100 for a year, for every such half-year for which such last-mentioned interest shall be so unpaid to him the said G. H., his executors, administrators, or assigns, for the space of one calendar month next after the day whereon such half-year's interest shall from time to time become due and pay-

Proviso that if mortgagor, when entitled to the higher, accept the lower rate of interest, he shall not thereby be precluded from demanding the higher rate on a subsequent occasion.

FREEHOLDS AND LEASEHOLDS.

able (*e*), [*covenants severally by C. D. and E. F. with G. H., his executors, administrators, and assigns, against incumbrances, supra, p.* 241]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said G. H., his heirs, executors, administrators, and assigns, in manner following, (that is to say), [*for title as to the freeholds, supra, p.* 464]: AND THAT the said indenture of the 8th day of August, 1809, at the time of the sealing and delivery of these presents is a good, valid, and effectual lease in the law of the said piece or parcel of ground and other hereditaments and premises therein comprised, and is in full force, unforfeited and unsurrendered, and in nowise become void or voidable: AND THAT all and singular the rents, covenants, and agreements in and by the said indenture of the 8th day of August, 1809, reserved and contained, and on the part of the lessees to be paid, observed,

Covenants by the trustees against incumbrance.

Covenants by mortgagor.

—for title to the freeholds.

—that lease is good.

—that rents and covenants have been paid and performed.

(*e*) An agreement in a mortgage, that if the interest be punctually paid the rate shall be reduced, is legal. (*Jory* v. *Cox*, Prec. Ch. 160; *Stanhope* v. *Manners*, 2 Eden, 197). In *Brown* v. *Barkham*, 1 P. Wms. 652, it was said, that the Court would relieve against the higher rate of interest if there were a large arrear; but this cannot now be considered law. See, however, the observations of Lord Eldon, 7 Ves. 273. An agreement for increasing the rate of interest on failure in punctual payment will be set aside in equity. (*Lady Holles* v. *Wise*, 2 Vern. 289; *Strode* v. *Parker*, Id. 316; *Nicholls* v. *Maynard*, 3 Atk. 519; *Walmesley* v. *Booth*, Ch. Rep. 481; *Bonafous* v. *Rybot*, Burr. 1375. These cases have overruled *Marquis of Halifax* v. *Higgens*, 2 Vern. 134. See, however, *Burton* v. *Slattery*, 5 Bro. P. C. 233). The last proviso in the text is inserted for the purpose of precluding the application of the doctrine of *Stanhope* v. *Manners*, (2 Ed. 197). In that case, the mortgage was at 5 per cent., and contained a proviso, that as often as the interest should be paid half-yearly on the days appointed, or within three months next, after each, so much should be deducted as would make the interest $3\frac{3}{4}$ per cent. By a separate agreement, the mortgagee covenanted not to call in the money for five years, unless the interest should be in arrear. The first half-year's interest was not paid till after the three months, but the second half-year's was tendered before; and it was held, that the mortgagee was only entitled to interest at $3\frac{1}{4}$ per cent. for the second half-year. It was also decided, that, in consequence of the first default, the mortgagee was at liberty to call in the principal. The clauses diminishing the rate of interest on regular payment are of great service in securing the punctual payment of interest.

Proviso for reducing the rate of interest.

FREEHOLDS AND LEASEHOLDS.

and performed, have been paid, observed, and performed up to the —— day of —— last: AND THAT, &c., [*for right to convey the freeholds, supra, p.* 484]: AND THAT they the said C. D., E. F., and A. B., now have in themselves good right, full power, and lawful and absolute authority to assign and confirm the said hereditaments and premises hereinbefore assigned and confirmed, or expressed and intended so to be, unto the said G. H., his executors, administrators, and assigns, for all the residue now to come of the said term of forty-one years, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO, THAT if default shall be made in payment of the said sum of £1,050, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said G. H., his heirs, executors, administrators, or assigns, respectively, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore granted and released and assigned, respectively, or expressed and intended so to be, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, use, possess, and enjoy, and receive and take the rents, issues, and profits thereof, and of every part thereof, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., C. D., and E. F., or any of them, their or any of their heirs, executors, administrators, or assigns, or any other person or persons whomsoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest in, to, or out of the said hereditaments and premises, or any of them, or any part or parts thereof: AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise by the said A. B., his heirs, executors, or administrators, saved, protected, kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever: AND MOREOVER, that they

—for right to convey.

—and assign.

—for quiet enjoyment.

—free from incumbrances.

—for further assurance.

FREEHOLDS AND LEASEHOLDS.

the said A. B., C. D., and E. F., and every of them, their and every of their heirs, executors, and administrators, and all and every other persons and person whomsoever, having, or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or interest of, in, or to the said hereditaments and premises hereinbefore released and assigned respectively, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time and at all times hereafter, upon the request of the said G. H., his heirs, executors, administrators, or assigns, but at the costs and charges of the said A. B., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying, and assuring all the said hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, unto and to the use of the said G. H., his heirs and assigns, and assigning and assuring the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, unto the said G. H., his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said G. H., his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required; AND ALSO THAT he the said A. B., his executors or administrators, shall and will from time to time and at all times, so long as the said principal sum of £1,000 and the interest thereon, or any part thereof, shall remain due or owing on the security of these presents, pay, observe, and perform, or cause to be paid, observed, and performed, as well all and singular the rents, covenants, and agreements in and by the said indenture of the 8th day of August, 1809, reserved and contained, and on the part of the lessees, their executors, administrators, and assigns, to be paid, observed, and performed, as all and singular the rents, covenants, and agree-

—for payment of rents and performance of covenants.

FREEHOLDS AND LEASEHOLDS.

ments, which shall in and by any lease or leases, to be at any time or times hereafter granted of the said hereditaments and premises comprised in the same indenture, be reserved and contained, and on the part of the lessee or lessees to be named therein, to be paid, observed, and performed: AND ALSO shall and will save, defend, and keep harmless and indemnified the said G. H., his executors, administrators, and assigns, and every of them, of, from, and against all actions, suits, proceedings, costs, charges, damages, and expenses whatsoever, (if any), which shall or may be incurred or sustained by reason or on account of the non-payment or non-performance of the same respectively, or any act, matter, or thing whatsoever, touching or concerning the same respectively, in anywise howsoever: AND ALSO THAT he the said A. B., his executors or administrators, shall and will from time to time during so long as the said principal sum of £1,000, or any interest for the same, or any part thereof respectively, shall remain due or owing on the security of these presents, at his or their proper costs and charges, procure the present lease and any renewed lease or leases which may hereafter be obtained of the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, to be renewed for a further term of forty years, pursuant to the covenant for renewal contained in the said indenture of the 8th day of August, 1809, or to be contained in any future lease of the same premises, (he the said G. H., his executors, administrators, or assigns, doing or joining in doing all such reasonable acts as may be necessary or expedient for the procuring of such renewal or renewals): AND ALSO THAT he the said A. B., his executors or administrators, shall and will immediately upon every such renewal well and effectually assign and assure the hereditaments and premises comprised in such renewed lease or leases unto the said G. H., his executors, administrators, and assigns, or to such other person or persons as he or they shall direct or appoint, for all such term or terms of years as shall be granted by any such renewed lease or leases respectively, but subject nevertheless to such right or equity of redemption as shall or

—and indemnifying the mortgagee.

—that mortgagor will procure renewed leases.

—and subject them to the mortgage.

FREEHOLDS AND LEASEHOLDS.

may be then subsisting in the said hereditaments and premises, under or by virtue of these presents: AND THAT, if the said A. B., his executors, administrators, or assigns, shall neglect or refuse to renew such lease or leases as aforesaid, and to pay the fines, fees, and other charges and expenses incident to and payable upon the renewal thereof, then, and so often as it shall so happen, it shall be lawful for the said G. H., his executors, administrators, or assigns, to renew such lease or leases in his or their own name or names, or in the name or names of such other person or persons as he or they shall appoint, and in that case all and every such new lease or leases, and the premises thereby to be demised, shall stand, remain, and be a security to the said G. H., his executors, administrators, or assigns, as well for the payment of all and every such sum and sums of money as shall be advanced and paid by him, them, or any of them, for the fines, fees, charges, and expenses of every such renewal, with interest for the same at the rate aforesaid from the time of his or their advancing or paying the same respectively, as for the payment of the said principal sum of £1,000, and the interest thereon, or such part thereof respectively as shall then remain due or owing on the security of these presents: PROVIDED ALWAYS that the amount of the money secured by these presents, or to be ultimately recoverable thereupon, shall not exceed the sum of £—— (*f*): PROVIDED ALWAYS, and it is hereby agreed

—and that, on neglect by mortgagor, mortgagee may renew and hold as a security for the original debt and costs of renewal.

Limitation of the amount of money to be secured.

Proviso for

(*f*) A covenant from the mortgagor, that he will duly renew the lease, should always be inserted in mortgages of this description; for the mortgagee has no right, independent of special stipulation, to compel the mortgagor to renew. (*Lacon* v. *Mertins*, 3 Atk. 1 & 4). But the mortgagee, independently of any special agreement, has a right to renew the lease himself, and to hold the lease as a security as well for the original principal and interest as for the monies expended in obtaining the renewal. (*Lacon* v. *Mertins*, ubi supra; *Manlove* v. *Bale*, 2 Vern. 84; *Woolley* v. *Drag*, 2 Anst. 551). And the rate of interest on the cost of renewal will be regulated by the rate of interest on the original principal. (*Woolley* v. *Drag*, 2 Anst. 551). There does not seem, therefore, to be much occasion for the introduction of the covenant permitting the mortgagee to renew and to charge the cost on the estate; and the ad valorem stamp-duty on the deed is necessarily increased by the insertion of that

As to the renewal of leases in mortgage.

FREEHOLDS AND LEASEHOLDS.

quiet enjoyment until default.

and declared, and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B., his heirs, executors, administrators, and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said hereditaments and premises hereinbefore granted and released and assigned respectively, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £1,000 and interest, or some part thereof respectively, contrary to the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said G. H., his heirs, executors, administrators, or assigns, or any other person or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them. IN WITNESS &c.

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covenant. Perhaps however, where, as in the case in the text, freeholds are mortgaged together with leaseholds, it might be considered, that in the absence of express agreement the leaseholds alone would be the security for the repayment of the expenses of renewal, and that therefore the provision in the text should be inserted. But there is not much ground for this apprehension. (See Coote on Mortgages, 2nd edit., pp. 472 & 647). The special power for the mortgagee to renew and hold the estate as a security for the expense, may perhaps be useful in preventing any question as to priority with subsequent incumbrancers; although, as a renewal is evidently for the advantage of all parties, the expense ought to be deemed a charge on the estate in preference to subsequent incumbrances.

Of course, even if there be no stipulation as to renewal, if the mortgagee renew a lease, he will only hold it as mortgagee, and not as absolute owner. (*Holt* v. *Holt*, 1 Cha. Ca. 190; *Rakestraw* v. *Brewer*, Sel. Ca. in Ch. 55; *Lee* v. *Vernon*, 5 Bro. P.C. 10).

As to the use and effect of the proviso limiting the amount to be secured, see supra, p. 523, n. (*l*).

LX.

MORTGAGE *of* COPYHOLDS (*a*).

COPYHOLDS.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., Parties.

(*a*) Mortgages of copyholds are made by surrender, conditioned to be void on payment of the mortgage debt and interest at the time and in manner specified, so that on payment of the money according to the condition, the surrenderor remains seised of his old estate. (*Simonds* v. *Lawnd*, Cro. Eliz. 239; see supra, p. 468, n. (*i*)). The condition exactly corresponds to the ordinary proviso for re-conveyance of freeholds, so that the provisos in any of the foregoing precedents may be easily modified to suit mortgages of copyholds. The surrender is, however, always accompanied by a deed which contains the usual covenants for payment of the mortgage debt and interest, and for title. This was sometimes accomplished in former times by a bond, but in modern practice a deed of covenants is preferred. The comparative advantages of making the surrender precede or follow the deed of covenants are discussed supra, p. 305, and the variations annexed to the Precedent XXXIII. will suggest to the draftsman the alterations required when the surrender precedes the deed. It should be remembered, however, that in no case ought the money to be advanced till the surrender is actually made, (supra, p. 304, n. (*a*), and cases there cited). It is not usual for a mortgagee to be admitted, not only because a considerable expense for fines and fees would be incident to his admission, but because an actual re-surrender to, and re-admission of the mortgagor with fresh fines and fees, would be necessary on paying off the mortgage. (See *Benson* v. *Scott*, 12 Mod. 49; *Doe* d. *Harman* v. *Morgan*, 7 T. R. 103). And if the mortgagee be actually admitted, he becomes liable to the payment of rents and heriots, and to the performance of the services, which is frequently undesirable. Till the admittance of the mortgagee the mortgagor remains tenant to the lord; (*Doe* d. *Shewen* v. *Wroot*, 5 East, 132; *Kenebel* v. *Scrafton*, 8 Ves. 30); and as well for the purposes of forfeiture and escheat as for other purposes. (*The King* v. *Lady St. John Mildmay*, 5 B. & Ad. 254; *Attorney-General* v. *The Duke of Leeds*, 2 My. & Ke. 343). But the lord's rights in the case of forfeiture and escheat are now qualified by the stat. 4 & 5 Will. 4, c. 23. The lord cannot compel the

Mortgages of copyholds.

COPYHOLDS.

Recital.

Witnesseth.

Covenant to surrender.

Parcels.

To the use of mortgagee.

Subject to a proviso for

[*mortgagee*], of the other part, [*recites agreement for loan, supra, p.* 464]: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £1,000, &c., the receipt, &c., *supra, p.* 465; he the said A. B., doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and his heirs, that he the said A. B., or his heirs, shall and will, at or before the next court to be holden in and for the manor of ——, in the county of ——, at his and their own costs and charges, well and effectually surrender or cause and procure to be surrendered into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the said manor, ALL THAT &c., [*parcels—general words*]: TO THE USE of the said C. D., his heirs and assigns, to be holden according to the custom of the said manor, and by and under the rents, fines, heriots, suits, and services therefore due, and of right accustomed, BUT SUBJECT to a proviso or condition for making void the said surrender to the use of the

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mortgagee to be admitted, for it is sufficient that there is a tenant on the rolls (the surrenderor) to perform the services. (*Basspool* v. *Long*, 1 Roll Abr. 568; Cro. Eliz. 879; *King* v. *Dilliston*, 1 Salk. 386; see, however, *Tredway* v. *Fotherley*, 2 Vern. 367). If a mortgagee of copyholds have not been admitted, and the mortgage is paid off, it is the practice for the mortgagee to execute an instrument authorizing the steward to vacate the surrender, and this instrument being entered on the rolls is sufficient evidence of the satisfaction of the mortgage. It is proper also that a receipt for the money should be indorsed on the accompanying deed of covenants.

It is not usual in mortgages of copyholds to provide by special covenants for the payment by the mortgagor of all fines, costs, and expenses attendant on admittance and other incidents of copyhold property; the matter is left to the general rule of equity, and undoubtedly the mortgagor would not be permitted to redeem until after repayment to the mortgagee of any such sum as he might have been compelled to expend. The case differs considerably from that of leaseholds where renewal is optional, (supra, p. 563, n. (*f*)); but still it might be desirable to arm the mortgagee with a covenant for payment of the sums he might be compelled or might find it desirable to expend by reason of the copyhold tenure. If the copyholds be held for lives, of course the mortgage should contain the usual provisions for renewal and payment of the fines.

COPYHOLDS.

said C. D. and his heirs; if the said A. B., his heirs, executors, administrators, or assigns, shall and do pay or cause to be paid to the said C. D., his executors, administrators, or assigns, the sum of £1,000, and the sum of £50, as and for one year's interest for the same after the rate of £5 for £100 for a year, making together the sum of £1,050, in the parts, shares, and proportions, on or at the days or times hereinafter mentioned, (that is to say), the sum of £25 part thereof, being half-a-year's interest for the said sum of £1,000, at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £1,025, residue thereof, being half-a-year's interest for the same, at the rate aforesaid, on the —— day of —— then next ensuing, which will be in the year ——, without any deduction or abatement whatsoever out of the same, or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, or any other matter, cause, or thing whatsoever (*b*): [*Covenant for payment of mortgage-money and interest, supra, p.* 469]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that he the said A. B., at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to the said hereditaments and premises hereinbefore covenanted to be surrendered, and every part thereof, for a good, sure, perfect, absolute, indefeasible estate of inheritance to him and his heirs, according to the custom of the said manor, and by and under the rents, fines, heriots, suits, and services therefore due and of right accustomed, without any manner of condition, use, trust, property, power of revocation, or limitation of any use or uses, or any other restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, incumber, revoke, or make void the same: AND THAT he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to sur-

making void the surrender.

Covenant for payment of debt and interest.

Covenants for title.

—for right to surrender.

(*b*) Of course this proviso may, if required, be expanded in the usual way. (See *supra*, p. 467, n. (*h*).).

COPYHOLDS.

[*mortgagee*], of the other part, [*recites agreement for loan, supra, p.* 464]: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £1,000, &c., the receipt, &c., *supra, p.* 465; he the said A. B., doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and his heirs, that he the said A. B., or his heirs, shall and will, at or before the next court to be holden in and for the manor of ——, in the county of ——, at his and their own costs and charges, well and effectually surrender or cause and procure to be surrendered into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the said manor, ALL THAT &c., [*parcels—general words*]: TO THE USE of the said C. D., his heirs and assigns, to be holden according to the custom of the said manor, and by and under the rents, fines, heriots, suits, and services therefore due, and of right accustomed, BUT SUBJECT to a proviso or condition for making void the said surrender to the use of the

Recital.

Witnesseth.

Covenant to surrender.

Parcels.

To the use of mortgagee.

Subject to a proviso for

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mortgagee to be admitted, for it is sufficient that there is a tenant on the rolls (the surrenderor) to perform the services. (*Basspool* v. *Long*, 1 Roll Abr. 568; Cro. Eliz. 879; *King* v. *Dilliston*, 1 Salk. 386; see, however, *Tredway* v. *Fotherley*, 2 Vern. 367). If a mortgagee of copyholds have not been admitted, and the mortgage is paid off, it is the practice for the mortgagee to execute an instrument authorizing the steward to vacate the surrender, and this instrument being entered on the rolls is sufficient evidence of the satisfaction of the mortgage. It is proper also that a receipt for the money should be indorsed on the accompanying deed of covenants.

It is not usual in mortgages of copyholds to provide by special covenants for the payment by the mortgagor of all fines, costs, and expenses attendant on admittance and other incidents of copyhold property; the matter is left to the general rule of equity, and undoubtedly the mortgagor would not be permitted to redeem until after repayment to the mortgagee of any such sum as he might have been compelled to expend. The case differs considerably from that of leaseholds where renewal is optional, (supra, p. 563, n. (*f*)); but still it might be desirable to arm the mortgagee with a covenant for payment of the sums he might be compelled or might find it desirable to expend by reason of the copyhold tenure. If the copyholds be held for lives, of course the mortgage should contain the usual provisions for renewal and payment of the fines.

COPYHOLDS.

said C. D. and his heirs; if the said A. B., his heirs, executors, administrators, or assigns, shall and do pay or cause to be paid to the said C. D., his executors, administrators, or assigns, the sum of £1,000, and the sum of £50, as and for one year's interest for the same after the rate of £5 for £100 for a year, making together the sum of £1,050, in the parts, shares, and proportions, on or at the days or times hereinafter mentioned, (that is to say), the sum of £25 part thereof, being half-a-year's interest for the said sum of £1,000, at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £1,025, residue thereof, being half-a-year's interest for the same, at the rate aforesaid, on the —— day of —— then next ensuing, which will be in the year ——, without any deduction or abatement whatsoever out of the same, or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, or any other matter, cause, or thing whatsoever (*b*): [*Covenant for payment of mortgage-money and interest, supra, p.* 469]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that he the said A. B., at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to the said hereditaments and premises hereinbefore covenanted to be surrendered, and every part thereof, for a good, sure, perfect, absolute, indefeasible estate of inheritance to him and his heirs, according to the custom of the said manor, and by and under the rents, fines, heriots, suits, and services therefore due and of right accustomed, without any manner of condition, use, trust, property, power of revocation, or limitation of any use or uses, or any other restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, incumber, revoke, or make void the same: AND THAT he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to sur-

making void the surrender.

Covenant for payment of debt and interest.

Covenants for title.

—for right to surrender.

(*b*) Of course this proviso may, if required, be expanded in the usual way. (See *supra*, p. 467, n. (*h*).).

COPYHOLDS.

render all the said hereditaments and premises hereinbefore covenanted to be surrendered unto and to the use of the said C. D., his heirs and assigns, according to the custom of the said manor, and in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO THAT if default shall be made in payment of the said sum of £1,050, or any part thereof, contrary to the aforesaid proviso and covenant for the payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said C. D., his heirs and assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore covenanted to be surrendered, or any of them, or any part thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof, to and for his or their own use and benefit, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., his heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim, in or to the said hereditaments and premises, or any of them, or any part or parts thereof (*c*): AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise, by the said A. B., his heirs or assigns, saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, other than the rents, fines, heriots, suits, and services, therefore due and of right accustomed: AND MOREOVER, THAT he the said A. B. and his heirs, and all and every other persons

—and for quiet enjoyment after default.

—free from incumbrances.

—and for further assurance.

Admittance relates back to surrender.

(*c*) A surrenderee cannot maintain an action of ejectment till after he has been admitted; but, as it is held that the admittance, when made, relates back to the surrender, the demise may be laid at any time in the interval between the surrender and admittance; (*Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 600); and the surrenderee, when admitted, may recover the mesne profits from the date of the surrender. (2 Wils. 15). A mortgagee may file a bill for foreclosure before admittance. (*Sutton* v. *Stone*, 2 Atk. 101).

COPYHOLDS.

and person whosoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest, of, in, or to the said hereditaments and premises, hereinbefore covenanted to be surrendered, or any of them, or any part or parts thereof, shall and will upon the request of the said C. D., his heirs or assigns, but at the costs and charges of the said A. B., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed all and every such further and other lawful acts, deeds, matters, things, surrenders, and assurances, in the law whatsoever, for the further, better, more perfectly and absolutely surrendering and assuring all the said hereditaments and premises hereinbefore covenanted to be surrendered, or expressed and intended so to be, unto and to the use of the said C. D., his heirs and assigns, according to the custom of the said manor, and under and subject to the rents, fines, heriots, suits, and services, therefore due and of right accustomed, and in manner aforesaid, according to the true intent and meaning of these presents, as by the said C. D., his heirs or assigns, or his or their counsel in the law shall be reasonably devised or advised and required: PROVIDED ALSO, and it is hereby agreed and declared between and by the said A. B. and the said C. D., and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B., his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises, hereinbefore covenanted to be surrendered, and to receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £1,050, or some part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said C. D., his heirs or assigns, or any other person or persons whomsoever, lawfully or equitably claiming or to claim, by, from, or under him, them, or any of them. IN WITNESS &c.

Proviso for quiet enjoyment until default.

LXI.

FREEHOLDS AND COPYHOLDS.

MORTGAGE *of* FREEHOLDS *and* COPYHOLDS.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., and E. F., of &c., [*mortgagees*], of the other part; [*recites conveyance of freeholds to uses, to bar dower in favour of A. B.*]:

Recital of conveyance of freeholds.

—of seisin of copyholds.

AND WHEREAS the said A. B. is seised or entitled for an estate of inheritance to him and his heirs, according to the custom of the manor of ——, in the county of ——, of or to the customary messuages, lands, and other hereditaments hereinafter particularly mentioned and covenanted to be surrendered, by and under the rents, fines, heriots, suits, and services therefore due and of right accustomed:

—of agreement for loan.

AND WHEREAS the said C. D. and E. F. have agreed to advance and lend to the said A. B. the sum of £1,000 out of monies belonging to them the said C. D. and E. F. upon a joint account, upon having the re-payment of the said sum of £1,000, with interest for the same after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned:

Witnesseth.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £1,000, &c., [*supra, p.* 481], And pursuant to

Appointment of freeholds.

&c., [*appointment of the freeholds to the use of the mortgagees, supra, p.* 465]: AND THIS INDENTURE ALSO WITNESSETH, that &c., [*conveyance by release of the freeholds to the mortgagees—freehold parcels—general words—habendum—see supra, pp.* 466 *and* 481]:

Witnesseth further release of freeholds.

Proviso for redemption of freeholds.

PROVIDED ALWAYS, &c., [*proviso for redemption, supra, p.* 481]:

Witnesseth further covenant to surrender copyholds.

AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B. doth hereby, for himself, his heirs, executors, and administrators,

FREEHOLDS AND COPYHOLDS.

covenant with the said C. D. and E. F., and their heirs, that he the said A. B. and his heirs shall and will, at or before the next court to be holden for the said manor of ——, at his and their own costs and charges, well and effectually surrender, or cause and procure to be surrendered into the hands of the lord or lady, lords or ladies of the said manor, according to the custom of the said manor, ALL THAT, &c., [*copyhold parcels—general words*], TO THE USE of the said C. D. and E. F., their heirs and assigns, to be holden according to the custom of the said manor, and by and under the fines, rents, heriots, suits, and services therefore due and of right accustomed, BUT SUBJECT to a proviso or condition for making void the same surrender on payment by the said A. B., his heirs, executors, administrators, or assigns, to the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, of the said sum of £1,050, in the parts and at the times in the proviso for redemption hereinbefore contained, appointed for the payment of the same respectively, [*covenant for payment of mortgage-money and interest, supra, p.* 483]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their heirs and assigns, by these presents in manner following, (that is to say), that the power hereinbefore exercised by him the said A. B., or expressed and intended so to be, was well and effectually created, and is now in full force and virtue, and in nowise suspended, extinguished, or become void: AND THAT he the said A. B. is at the time of the sealing and delivery of these presents lawfully and rightfully seised of or entitled to a good, sure, absolute and indefeasible estate of inheritance to him and his heirs, according to the custom of the said manor, and by and under the rents, fines, heriots, suits, and services, therefore due and of right accustomed, of and in the said messuages, hereditaments, and premises, hereinbefore covenanted to be surrendered, without any condition, use, trust, power of revocation, or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, charge, incumber, lessen, deter-

—to the use of the mortgagees.

—subject to proviso for making void the surrender.

Covenant for payment of mortgage money and interest.

Covenants.

—that the power of appointment is good.

—for seisin of the copyholds.

FREEHOLDS AND COPYHOLDS.

—for right to appoint, convey, and surrende.

mine, defeat, or make void the same estate: AND THAT he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to appoint and grant, and release and surrender all the said messuages, farms, lands, hereditaments, and premises, hereinbefore appointed and granted, and released, or expressed or intended so to be, and covenanted to be surrendered respectively, unto and to the use of the said C. D. and E. F., their heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND ALSO, THAT if default shall be made in payment of the said sum of £——, or any part thereof, contrary to the aforesaid proviso for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said C. D. and E. F., their heirs and assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy and enjoy, and receive and take the rents, issues, and profits thereof to and for his and their own use, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., his heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having, or lawfully or equitably claiming, or to have, or lawfully or equitably claim, in or to the said hereditaments and premises, or any of them or any part or parts thereof: AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise, by the said A. B., his heirs, executors, or administrators, saved, protected, kept harmless, and indemnified, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever, other than the rents, fines, heriots, suits, and services, due, and of right accustomed in respect of the said copyhold hereditaments and premises: AND MOREOVER, that he the said A. B. and his heirs, and all and every other persons and person whosoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or

—and for quiet enjoyment after default.

—free from incumbrances.

—and for further assurance.

FREEHOLDS AND COPYHOLDS.

interest, of, in, or to the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, and covenanted to be surrendered respectively, or any of them, or any part or parts thereof, shall and will, from time to time, and at all times hereafter, upon the request of the said C. D. and E. F., or either of them, their or either of their heirs or assigns, but at the costs and charges of the said A. B., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, appointments, conveyances, surrenders, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely appointing, granting, conveying, surrendering, and assuring all the said hereditaments and premises unto and to the use of the said C. D. and E. F., their heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents, (subject nevertheless, as to the said copyhold hereditaments, to the rents, fines, heriots, suits, and services, therefore due and of right accustomed), as by the said C. D. and E. F., or either of them, their, or either of their heirs or assigns, or their or his counsel in the law, shall be reasonably devised or advised and required: PROVIDED ALSO, and it is hereby agreed and declared between and by the said A. B., and the said C. D. and E. F., and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B., his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises, hereinbefore appointed and released, or expressed or intended so to be, and covenanted to be surrendered respectively, and receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £1,050, or some part thereof, contrary to the aforesaid proviso for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said C. D. and E. F., their heirs or assigns, or by any other

Proviso for quiet enjoyment until default.

FREEHOLDS AND COPYHOLDS.

person or persons whomsoever, lawfully or equitably claiming, or to claim, by, from, or under him, them, or any of them. IN WITNESS &c.

LXII.

BY DEMISE TO SECURE PORTION.

MORTGAGE *by* DEMISE *for* PART *of a* TERM *of Years*(*a*) *for securing a* PORTION.

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., and C. D., of &c., [*trustees of the term of years*], of

Comparative advantages of mortgages in fee and for years.

(*a*) The most common mode of mortgaging in former times, at least when the sum was small, was by a demise for a long term of years; and to this circumstance most of the old attendant terms of the present day owe their origin. The method was recommended by its requiring only one deed, which needed neither enrolment nor livery of seisin; and by the circumstance, that the chattel estate created went to the mortgagee's personal representatives, together with the debt. But, on the other hand, the mortgagee, if he foreclosed, got only a term instead of the fee, and unless by special stipulation he was not entitled to the custody of the title-deeds; (supra, p. 45); or to the other advantages incident to a freehold estate. A mortgage, too, for a term did not admit of the introduction of an effective power of sale, for the mortgagee could alone dispose of the term unless the mortgagor concurred in the sale. These disadvantages have led to the almost universal abandonment of mortgages for terms of years, except in the cases of the mortgage being contained in a purchase-deed, (supra, Precedents XXXVI. and XXXIX.) or being made under a term or power contained in a settlement. In the former case there is no good reason for the practice, but in the latter it is a matter of necessity, unless the owner of the fee joins in the security. And it may happen, (as in the Precedent), that the owner of the fee may be willing to join and covenant for payment of the money, but may decline to divest himself of the freehold estate.

Mortgages for securing and raising portions.

When a mortgage for raising or securing a portion, or a charge, is made by trustees alone, it is an inconvenient circumstance that there is no one to covenant for payment of the principal-money and interest, so that the mortgagee must look to the land as his only resort. But it is generally found, that the tenant for life or the owner in fee is willing to facilitate matters by entering into the necessary covenant. If the owner

BY DEMISE TO SECURE PORTION.

the first part; E. F., of &c., [*the owner of the inheritance*], of the second part; and G. F., of &c., [*mortgagee*], of the third part: WHEREAS E. F., now deceased, (the father of the said E. F., party hereto and of the said G. F.), duly made, signed, and published his last will and testament in writing, bearing date the —— day of ——, and thereby gave and devised all his manors, messuages, lands, tenements, and hereditaments, and real estate, in the county of ——, unto and to the use of the said A. B. and C. D., their executors, administrators, and assigns, for the term of 500 years, to be computed from the day of his the said testator's decease, without impeachment of waste, upon and for the several trusts, intents, and purposes, thereinafter expressed and declared of and concerning the same, and in part hereinafter mentioned, and from and after the determination of the said term of 500 years, and in the meantime subject thereto and to the trusts thereof, the said testator gave and devised the said manors, messuages, lands, tenements, hereditaments, and real estate, unto and to the use of his the said testator's three sons, the said E. F. party hereto, the said G. F., and H. F., successively, according to their respective seniorities, in tail male, AND the said testator thereby declared that the said manors, hereditaments, and premises, were so devised to the said A. B. and C. D., their executors, administrators, and assigns, for the said term of 500 years as aforesaid, upon trust, (among other things), that they the said trustees, or the survivor of them, or the executors or administrators of such survivor, should, before

Recital of will creating the term.

—of trusts of term to raise a legacy, also an annuity or portion at option of the legatee.

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of the fee be a party, the mortgage may be made in any manner the parties please; but if he be not a party, or if, from fear of letting in his incumbrances or otherwise, the mortgage be made in pursuance of the power, the terms of that power must be strictly adhered to. Thus, if the power authorize the creation of a term, with a proviso for cesser in certain events, the term which is created must be made to cease on those events. And if the mortgage be of a term, or under a term created by the original deed, it must be seen that the manner in which that term is dealt with conforms to the directions contained in the deed creating it. The law with respect to these matters will be found in Coote on Mortgages, 2nd edit., Book II. Chap. 6; and in 2 Sugd. Pow. Ch. 15, s. 3.

BY DEMISE TO SECURE PORTION.

the end of six calendar months next after his the said testator's decease, by demise, assignment, mortgage, sale, or other disposition of the said manors, hereditaments, and premises, or of any of them, or of any part or parts thereof, for all or any part of the said term of 500 years, or by and out of the rents, issues, and profits thereof, or by all and every or any ways and means thereinbefore mentioned, or by any other ways and means, levy and raise the sum of £2,000, together with interest for the same after the rate of £4 per cent. per annum from the time of his decease, and pay the same to his son the said G. F. for his own use and benefit; and should, by, with, and out of the rents, issues, and profits of the said manors, hereditaments, and premises, levy and raise, and pay to the said G. F., or his assigns, during his life, the clear yearly sum of £500, to commence from the time of his the said testator's decease, and to the said H. F. and his assigns during his life, a like yearly sum of £500, to commence from the time of his the said testator's decease, and in case his said sons G. F. and H. F., or either of them, should at any time or times, within the space of a period of five years after they should respectively become entitled to the said respective yearly sums of £500 and £500, determine to accept a gross sum or gross sums of money, after the rate of ten years' purchase for all or any part or parts of the said respective yearly sums of £500 and £500, and should signify such his, her, or their option, by writing under his or their respective hand or hands, to the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, then and in every such case they the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, should, by all and every or any of the ways and means thereinbefore mentioned, levy and raise such gross sum or sums of money, after the rate aforesaid, and pay the same to the said G. F. and H. F., or such one of them as should make such option or options as thereinbefore was mentioned: AND WHEREAS the said E. F., deceased, died on the —— day of ——, without having revoked or altered his said will: AND WHEREAS, by an

—of death of testator.

—of recovery

BY DEMISE TO SECURE PORTION.

indenture of release, bearing date the —— day of ——, grounded on a lease for a year, and made, or expressed to be made, between [*parties*] for the considerations therein mentioned, the said E. F., party hereto, did grant and release unto the said M. N. and his heirs, the said manors, messuages, lands, tenements, and hereditaments, devised by the said will of the said E. F. deceased, to the uses, and in manner hereinbefore mentioned, with their rights, members, and appurtenances, to hold the same unto and to the use of the said M. N., his heirs and assigns, to the intent that the said M. N. might become perfect tenant of the same premises, in order that one or more common recovery or common recoveries might be suffered thereof, in which the said E. F., party hereto, was to be vouchee, and which common recovery or common recoveries, it was thereby declared, should enure to the use of the said E. F., party hereto, his heirs and assigns for ever: AND WHEREAS, in pursuance of the said indenture of release, a common recovery, in which the said E. F., party hereto, was vouchee, was duly suffered in —— term in the —— year of his late Majesty King ——, before his Majesty's Justices of the Court of Common Pleas at Westminster: AND WHEREAS, on the —— day of ——, the said E. F., in exercise of the power enabling him in that behalf, under or by virtue of the said will of the said E. F. deceased, signified to the said A. B. and C. D. his option to accept the sum of £5,000 as a gross sum of money, after the rate of ten years' purchase, for the whole of the said yearly sum of £500 to him by the said will bequeathed, or directed to be paid as aforesaid: AND WHEREAS the said legacy or sum of £2,000, given and bequeathed to the said G. F. by the said will, still remains due and owing to the said G. F., but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS all arrears of the said yearly sum of £500, given or bequeathed to the said G. F. by the said will, have been paid up to the day on which the same yearly sum determined in consequence of the option, so as aforesaid signified by the said G. F., to accept a gross sum in lieu of the said yearly sum: AND WHEREAS the principal sum of £5,000, to which the said G. F. became entitled by

deed by the eldest son to bar his entail.

—of recovery accordingly.

—of the legatee having signified his option to take the portion.

—of the legacy remaining unpaid.

—of arrears of annuity having been paid up to the day of its determination.

—of the portion remaining due.

BY DEMISE TO SECURE PORTION.

—of agreement for mortgage in discharge of the legacy and portion.

having signified such option as aforesaid, is now due and owing to the said G. F., but all interest for the same hath been paid up to the day of the date of these presents (*b*): AND WHEREAS it has been agreed, that, in satisfaction and discharge of the said legacy or sums of £2,000 and £5,000, a mortgage for the sum of £7,000, with interest for the same in the meantime, after the rate hereinafter mentioned, shall be made to the said G. F. under the trusts of the said term of 500 years, of the said messuages, lands, and other hereditaments, hereinafter particularly mentioned, and intended to be hereby demised with their appurtenances, and that the said E. F., party hereto, shall enter into the covenants hereinafter contained for payment of the said sum of £7,000 and the interest thereof, and into the other covenants hereinafter contained on the part of him the said E. F.: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in full satisfaction and discharge of the said legacies or sums of £2,000 and £5,000, (of and from which said legacies or sums of £2,000 and £5,000, and the interest thereof respectively, the said G. H. doth acquit, release, and discharge the said A. B. and C. D., and each of them, their and each of their heirs, executors, administrators, and assigns for ever by these presents), and in consideration of 10*s.* to the said A. B. and C. D. paid by the said G. F., at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged), they the said A. B. and C. D., with the privity and consent of the said E. F., party hereto, (testified by his being a party to and executing these pre-

Witnesseth.

Consideration.

Demise.

Legacy duty on legacies payable out of real estate.

(*b*) No reference is made in the deed to the legacy duty, but both the trustees and the owner of the land ought to see that before the mortgage is made the legatee has satisfied the stamp-office in respect of duty, and that a properly stamped receipt has been given. For, by the stat. 45 Geo. 3, c. 28, s. 5, the duties on legacies payable out of real estate are to be paid by the owner of the estate and retained out of the legacy. And where there is more than one owner in possession, it seems that they are all liable. (*Attorney-General* v. *Jackson*, 2 Cro. & Jer. 101). It must, however, be remembered, that a direction that the legacy shall be paid without deduction and other similar expressions would throw the duty on the land. (1 Wm's Executors, Pt. 3, Bk. 5, Ch. III; *Sanders* v. *Kiddell*, 7 Sim. 356).

sents), have, and each of them hath bargained, sold (*c*), and demised, and by these presents do, and each of them doth bargain, sell, and demise, and the said E. F., party hereto, hath granted, bargained, sold, demised, and confirmed, and by these presents doth grant, bargain, sell, demise, and confirm unto the said G. F., his executors, administrators and assigns: ALL THAT &c., [*parcels*], being part of the hereditaments by the said will of the said E. F. deceased, devised or limited to the said A. B. and C. D., their executors, administrators, and assigns, for the said term of 500 years, as hereinbefore is mentioned, together with, &c., [*general words, omitting the "all the estate" clause*] (*d*): TO HAVE AND TO HOLD the said messuages or tenements, pieces or parcels of lands, and hereditaments, and all and singular other the premises hereby demised, or expressed and intended so to be, unto the said G. F., his executors, administrators, and assigns, for the term of 450 years, to commence from the day next before the day of the date of these presents, and thenceforth next ensuing, and fully to be complete and ended without impeachment of waste, subject nevertheless to the proviso for cesser hereinafter contained, (that is to say): PROVIDED ALWAYS, and it is hereby agreed by and between the parties to these presents, and the true intent and meaning of them, and of these presents nevertheless is, that if the said A. B. and C. D., their executors, administrators, or assigns, or the said E. F., party hereto, his heirs, executors, administrators, or assigns, shall and do pay or cause to be paid to the said G. F., his executors, administrators, or assigns, the sum of £7,000, and the sum of £350, as and for one year's interest for the same, at the rate of £5 for £100 for

BY DEMISE TO SECURE PORTION.

Parcels.

Habendum.

Proviso for cesser of term on payment of mortgage-money and interest.

(*c*) In this Precedent, the words, "bargain and sell" are retained, and a nominal consideration expressed to give them effect. For as the deed creates only a term of years, it will, without enrolment, operate as a bargain and sale. (See *supra*, p. 196, n. (*i*); 2 Sanders on Uses, 43, title BARGAIN and SALE).

Bargain and sale.

(*d*) With reference to the omission of the clause of "All the estate," &c.; see, *supra*, p. 542, n. (*e*).

BY DEMISE TO SECURE PORTION.

a year, making together the sum of £7,350, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £175 part thereof, being half-a-year's interest for the said sum of £7,000, at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £7,175 residue thereof, being the whole of the said principal sum of £7,000, and another half-year's interest for the same at the rate aforesaid, on the —— day of —— then next ensuing, which will be in the year ——, without any deduction or abatement whatsoever, then and in such case, and immediately after such payment shall be so made as aforesaid, the said term of 450 years shall absolutely cease, determine, and be void to all intents and purposes whatsoever, [*covenant by E. F. with G. F., his executors and administrators, for payment of the mortgage-money and interest, supra, p. 469; covenants severally by A. B. and C. D. with G. F., his executors, administrators, and assigns, that they are not prevented from demising, and against incumbrances, see supra, p. 249; covenants by E. F. with G. F., his executors, administrators, and assigns, that A. B., C. D., and E. F., respectively, have right to demise —for quiet enjoyment after default—free from incumbrances —and for further assurance, see supra, p. 545 et seq.:*]

Covenants.

PROVIDED ALSO, and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of them, and of these presents nevertheless further is, that it shall be lawful for the person or persons for the time being entitled to the messuages or tenements, hereditaments, and premises, hereinbefore demised, or expressed and intended so to be, in remainder or reversion expectant on the said term of 450 years, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said messuages, or tenements, hereditaments, and premises, hereinbefore demised, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £7,350, or

Proviso for quiet enjoyment until default.

some part thereof, contrary to the aforesaid proviso for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said G. F., his executors, administrators, or assigns, or any other person or persons whomsoever, lawfully claiming or to claim by, from, or under him, them, or any of them: AND LASTLY, the said E. F. doth hereby declare, that, as between his real and personal representatives, his personal estate shall be the primary fund for payment of the said sum of £7,000, and the interest thereof (*e*). IN WITNESS &c.

BY DEMISE TO SECURE PORTION.

Declaration by the owner of the inheritance that his personal estate is to be primary liable.

LXIII.

MORTGAGE *of two* LEASES *of* MINES *with the* LICENCE *of the Lessors; with Restrictions against further Assignments, without fresh Licences.* POWER *of* SALE. PROVISIONS *for Payment of the Mortgage-money by* INSTALMENTS, *and of the* POSTPONEMENT *of the Payment of Instalments in certain Events.* RELEASE *by one of the Lessors of a former Breach of Covenant.*

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the first part; C. D., of &c., [*first lessor*], of the second part; E. F., of &c., [*second lessor*], of the third part; and G. H. and I. K., of &c., bankers and co-partners, [*mortgagees*], of the fourth part; [*recites a mining lease, dated the 25th of March, 1823, from M. N.*

Parties.

Recital of first lease.

(*e*) This clause is inserted to prevent the disputes which might otherwise arise between the real and personal representatives of the owner of the fee, from his having covenanted for payment of the money. (See Coote on Mortgages, Book V. Ch. 3). It may be proper to protect the mortgagee by a clause similar to that given, supra, p. 536.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

—and the proviso for re-entry.

to A. B. for a term of forty years, and recites at length the proviso for re-entry on several events, and among others], "in case the said A. B., his executors or administrators, should grant, assign, exchange, let, demise, or part with the possession of the said demised messuage, lands, mines, and premises, or any part thereof, unto any person or persons whomsoever, (except to or in trust for his wife, children, or child), without the express licence and consent of the said M. N., his heirs or assigns, first had and obtained in writing under his or their hand or hands for that purpose, or if the said A. B., his executors or administrators, should suffer the said thereby demised messuage, lands, mines, and premises, or any part thereof, or the said lease now in recital, to be extended or taken in execution for any debt, cause, or thing whatsoever, or if the said A. B., his executors or administrators, should commit any act of bankruptcy within the meaning of any statute or statutes, made, or to be made in relation to bankrupts, whereon a commission of bankrupt should issue, and he or they should be found and declared to be bankrupt, and such commission should not afterwards be vacated, abandoned, or superseded, without delay": [*Recites a mining lease, dated the 29th of December*, 1823, *from P. Q. to A. B., for a term of twenty-one years, at* (*among other rents*) *a rent of* £1,000, *to be paid in each year for one acre, whether worked or not, and reciting at length as follows:*] AND in the said indenture now in recital were contained divers covenants, agreements, and conditions, on the part of the said lessee, his executors, administrators, or assigns, to be observed and performed, and particularly in the said indenture now in recital was contained a proviso, that he the said A. B., his executors, administrators, and assigns, should not during the said term thereby demised, until the whole of the said mine rent or payments should be satisfied and discharged, assign over or under-let, or agree to demise, assign, or under-let, all or any part of the mines, minerals, or other matters, thereby granted or demised, or intended so to be, for all or any part of the said term, without the licence, approval, and consent in writing of the said P. Q., his heirs or assigns, for every such purpose,

—of second lease.

—and the covenant not to assign.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

from time to time, first had and obtained (*a*): [*Recites divers dealings of A. B. with his creditors, and a final release by them to him of all claims, excepting a claim by G. H. and I. K., in respect of a mortgage by demise of the property comprised in the term of twenty-one years for securing* £9,000 *and further advances, not exceeding in the whole* £10,000]: AND WHEREAS the reversion expectant on the said term of forty years, granted by the said indenture of the 25th day of March, 1823, of and in the premises therein comprised is now vested in the said C. D., and the reversion expectant on the said term of twenty-one years, granted by the said indenture of the 29th day of December, 1823, of and in the premises comprised, is now vested in the said E. F. (*b*): AND WHEREAS a considerable sum of money is now due and owing by the said A. B. to the said G. H. and I. K. upon the security of the said indenture of the —— day of —— 1836: AND WHEREAS the said G. H. and I. K., in order to enable the said A. B. to effectuate the arrangement hereinbefore mentioned to have been made with his said creditors, and for other purposes, have at the request of the said A. B. advanced and paid divers large sums of money to, or to the order, or for the use, or on the account of the said A. B.: AND WHEREAS, upon the treaty for the said advances it was agreed that the re-payment of such sums of money as should upon an account stated be found due from the said A. B. to the said G. H. and I. K., as well upon the said security as in respect of the said advances, should

—of various transactions with creditors, and a mortgage to the present mortgagees.

—of the present ownership of the reversion of the leases.

—of money owing to mortgagees on their security.

—and for other advances.

—of agreement for present mortgage.

(*a*) In recitals of leases it is necessary to give the literal description, not only of the lands, but also of all the powers, privileges, and easements demised. The exceptions and reservations, too, must be stated in the words of the lease; for otherwise the recital would give an inaccurate view of the operation of the lease. It is also proper to state the rents reserved in the words of the lease, and in leases of mines in which the rents are usually numerous and complicated in their circumstances, this is especially necessary; there is, in fact, no proper alternative but that of referring to them generally, as "the rents thereby reserved;" for to half state them is extremely mischievous.

Recitals of leases.

(*b*) This, perhaps, is a sufficient recital as to the ownership of the reversion; but even if it be not so, it is seldom in the power of the leaseholder to furnish any other.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

be secured to the said G. H. and I. K., their executors, administrators, and assigns, with interest in manner hereinafter mentioned: AND WHEREAS, upon an account this day stated between the said A. B. and the said G. H. and I. K., there is due and owing from the said A. B. to the said G. H. and I. K. the sum of £30,000: AND WHEREAS, as part of the said intended security, it was agreed that the said A. B. should, (with the licence and consent of the said C. D. first had and obtained), assign unto the said G. H. and I. K., their executors, administrators, and assigns, in manner hereinafter mentioned, the messuages, lands, mines, hereditaments, and premises by the said indenture of the 25th day of March, 1823, demised or expressed and intended so to be: AND WHEREAS the said C. D. hath given his licence and consent (to be testified as hereinafter mentioned) to such assignment of the said premises as is hereinafter contained, upon condition that such power or right of re-entry as is mentioned in the indenture of even date herewith, hereinafter recited, and intended to be endorsed on the counterpart of the said indenture of the 25th day of March, 1823, should be granted to him the said C. D., and that the said G. H. and I. K. should enter into such covenant with him as in the same endorsed indenture is contained: AND WHEREAS, as further part of the said security, it was agreed that the said A. B. should (with the licence, approval, and consent of the said E. F. first had and obtained) assign unto the said G. H. and I. K., their executors, administrators, and assigns, in manner hereinafter mentioned, the messuages, lands, tenements, mines, hereditaments, and premises by the said indenture of the 29th day of December, 1823, demised or expressed and intended so to be: AND WHEREAS the said E. F. hath given his licence, approval, and consent (to be testified as hereinafter mentioned) to such assignment of the said last-mentioned premises as is hereinafter contained, upon the condition that the said G. H. and I. K. should enter into such covenant with him the said E. F., his heirs and assigns, as is contained in the indenture of even date herewith, hereinafter recited, and intended to be endorsed on the counterpart of the said indenture of the 29th day of

—of amount of existing debt.

—of agreement to include first lease in the security.

—of consent of first lessor.

—of agreement to include second lease in the security.

—of consent of second lessor.

December, 1823: AND WHEREAS there is a considerable arrear of mine-rent, amounting in the whole to the sum of £4,000 or thereabouts, due to the said E. F. upon the said indenture of the 29th day of December, 1823, and upon the treaty for the said advances it was agreed between the said A. B. and the said G. H. and I. K., that in case the said E. F., his heirs or assigns, should call for and compel payment of the said arrear, or any part thereof, in manner hereinafter mentioned, then the re-payment of the said principal sum of £30,000 should be made subject to the proviso and stipulations in that behalf hereinafter contained, for postponing in point of time the payment of the instalments thereof, in manner hereinafter mentioned: AND WHEREAS it is apprehended that the said A. B., by making the demise contained in the said indenture of the —— day of ——, 1836, without the licence, approval, or consent of the said E. F., committed a breach of his hereinbefore recited covenant in that behalf: AND WHEREAS the said E. F. has agreed to release the said A. B., his heirs, executors, administrators, and assigns, from his and their liability in respect of such breach of covenant in manner hereinafter mentioned: AND WHEREAS, in pursuance of the said agreement in this behalf, by an indenture bearing or intended to bear even date with, but to be executed immediately after, the execution of these presents, and already prepared and endorsed on the counterpart (*c*) of the said

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

—of arrears of mine-rent owing to second lessor, and arrangement in consequence.

—of apprehended breach of covenant.

—and agreement to release the same.

—of deed of defeasance to restore the right of re-entry to the first lessor.

(*c*) In the precedent in the text, it will be seen, that the deeds of defeasance and covenant, which were executed to prevent any further assignments without fresh licences from the lessors, were endorsed on the counterparts of the leases. This arrangement saves the recital of the leases, but may of course be abandoned if inconvenient.

Method of restoring a condition not to assign without licence.

The deeds recited are rendered necessary by the doctrine established in *Dumpor's case*, 4 Co. Rep. 119; that if a licence to assign be once given, the restriction is at end. (See, too, *Brummel* v. *Macpherson*, 14 Ves. 173). In the first lease recited in the precedent, it will be seen, that the restriction on alienation was made by a condition of re-entry in case of assignment without licence; and hence, on a licence to assign being given, in order to put the lessor in the same situation he was in before, a new condition of re-entry is created by a deed of defeasance executed by the assignee. But, in the second lease, the restriction consisted only of a covenant by the lessee not to assign, and therefore a new

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

indenture of the 25th day of March, 1823, and made or expressed to be made between the said G. H. and I. K. of the first part, the said A. B. of the second part, and the said C. D. of the third part; after reciting these presents, and particularly the assignment intended to be hereinafter made by the said A. B., with the licence and consent of the said C. D., of the said premises by the said indenture of the 25th day of March, 1823, demised or expressed and intended so to be: It is by the said indenture now in recital witnessed, [*recites the operative part of the deed verbatim, and without change of tense—see the Precedent of the deed in a future Volume:*] AND it is by the said indenture now in recital provided, that nothing therein, or in these presents contained, shall be construed to authorize the said G. H. and I. K., their executors, administrators, or assigns, to re-assign the said premises to the said A. B., his executors, administrators, or assigns, in pursuance of the proviso for redemption hereinafter contained, without the express licence and consent of the said C. D., his heirs or assigns, first had and obtained for that purpose in writing under his or their hand or hands: AND WHEREAS, in pursuance of the said agreement in this behalf, by an indenture bearing or intended to bear even date with, but to be executed immediately after the execution of these presents, and already prepared and endorsed on the counterpart of

—of deed of covenant to restore the power of restraining alienation of the second lease.

covenant was all that was required for restoring to the lessor his former power. It is however assumed, that the second lease did not contain a proviso for re-entry on breach of the covenants; for if it had done so, a deed of defeasance to restore the right of re-entry would have been required in this case as well as the other. (*Lloyd* v. *Crispe*, 5 Taunt. 249). It is sometimes attempted to avoid the necessity of a deed of defeasance by annexing a condition to the licence, that it shall not authorize further assignments; but there is little doubt of this restraint being ineffectual. (See the observations of *Gibbs*, C. J., 7 Taunt. 11, n. (*f*); see, too, *Lloyd* v. *Crispe*, ubi supra). With regard to the nature and operation of defeasances, see the notes to a precedent of a deed of defeasance in a subsequent volume, and 2 Cru. Dig., by White, vol. ii. p. 7, n. (*b*); and vol. iv. pp. 89, 90; and with regard to restrictions on assignment without licence, information will be found in the first volume of this work, Art. LEASES; and in the notes to the precedent of such a lease in a subsequent volume. See, too, 2 Cru. Dig., by White, pp. 7 et seq.).

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

the said indenture of the 29th day of December, 1823, and made or expressed to be made between the said G. H. and I. K. of the first part, the said A. B. of the second part, and the said E. F. of the third part; after reciting these presents, and particularly the assignment intended to be hereinafter made by the said A. B. with the licence, approval, and consent of the said E. F., of the said premises by the said indenture of the 29th day of December, 1823, demised or expressed and intended so to be: It is, by the said indenture now in recital, witnessed, that they the said G. H. and I. K. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns, that the said A. B., his executors, administrators, or assigns, or they the said G. H. and I. K. or one of them, their or one of their executors or administrators, shall and will from time to time and at all times thereafter during the continuance of the said term of twenty-one years created by the said indenture of the 29th day of December, 1823, or until the same term shall have been re-assigned to the said A. B., his executors, administrators, or assigns, by virtue and in pursuance of the proviso for redemption hereinafter contained, pay, keep, observe, and perform, all and singular the rents, covenants, conditions, and agreements in and by the said indenture of the 29th day of December, 1823, reserved and contained, and which on the tenant's or lessee's part ought to be paid, kept, observed, and performed; and it is thereby agreed and declared, that the said G. H. and I. K., their heirs, executors, or administrators, or any of them, shall not under the covenant thereinbefore contained, or otherwise, be liable to pay any of the said arrears of rent now due to the said E. F. upon the said indenture of lease of the 29th day of December, 1823, nor be liable for any breach, before the day of the date thereof, of any of the covenants in the said indenture of the 29th day of December, 1823, contained: And by the said indenture now in recital, the said G. H. and I. K. do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant with the

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

said E. F., his heirs and assigns, that they the said G. H. and I. K., their executors or administrators, shall not nor will demise, assign over, or underlet, or agree to demise, assign over, or underlet, to any person or persons, all or any part of the mines, minerals, or hereditaments by the said indenture of the 29th day of December, 1823, demised, or expressed and intended so to be, for all or any part of the said term, without the licence, approval, and consent in writing of the said E. F., his heirs or assigns, for every such assignment from time to time first had and obtained, except by permitting the said A. B., his executors, administrators, or assigns, to hold the said premises in pursuance of the proviso in these presents contained for quiet enjoyment of the said premises by the said A. B., his executors, administrators, or assigns, until default as in the same indenture is mentioned, and except by re-assigning to the said A. B., his executors, administrators, or assigns, in pursuance of the proviso for redemption hereinafter contained (*d*): NOW THIS INDENTURE WITNESSETH,

Witnesseth.

Consideration.

that, in pursuance of the said agreement in this behalf, and in consideration of the said sum of £30,000 so due and owing by the said A. B. to the said G. H. and I. K. as aforesaid, and of the premises, he the said A. B., with the licence and consent of the said C. D., (testified by his being a party to and sealing and delivering these presents), hath assigned, and by these presents doth assign, unto the said G. H. and I. K., their executors, administrators, and assigns, ALL THAT the said messuage, buildings, closes, pieces, or parcels of land, meadow and pasture, mines or beds of coal and ironstone, ways, waters, watercourses, easements, and appurtenances, powers, liberties, and authorities by the said indenture of the 25th day of March, 1823, demised, or expressed and intended so to be, with their and every of their appurtenances: AND ALSO all and sin-

Assignment with licence.

—of premises in first lease.

—and the fix-

(*d*) It will be seen, that the provision as to this matter is different as to the different leases. The mortgagees are permitted to re-assign the second lease without licence, but are restrained from re-assigning the first, unless under a fresh licence. As to exceptions out of a restriction on alienation, see *Lloyd* v. *Crispe*, 5 Taunt. 249.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

gular the buildings, erections, furnaces, forges, founderies, canals, railways, framed waggon-ways, weighing machines, engines, steam engines, gins, works, implements of manufacture, tools, machinery and fixtures, bricks, curbs, ropes, timber, goods and chattels, of what kind or nature soever, which have been or shall be at any time during the continuance of this present security, erected, constructed, or brought upon the said premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof: AND ALSO all and singular the coal, slack, and ironstone, which are or shall be gotten or raised during the continuance of this present security out of the said premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof; and also the coke, iron, and all other the produce of the said coal, slack, and ironstone: AND ALL the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said A. B., of, in, to, out of, or upon the said premises or any of them, or any part thereof, TO HAVE, HOLD, USE, AND ENJOY all such and so many and such part and parts of the said messuage, buildings, closes, pieces and parcels of land, meadow and pasture, mines and beds of coal and ironstone, powers, liberties, and authorities, and of all and singular other the premises hereinbefore assigned, or expressed and intended so to be, as were by the said indenture of the 25th day of March, 1823, demised, or expressed and intended so to be, or are or shall be fixed to the freehold of the said premises, and shall not belong to the tenant, unto and by the said G. H. and I. K., their executors, administrators, and assigns, (they nevertheless exercising the said powers, liberties, and authorities, only in the manner and subject to the provisions and restrictions mentioned and contained in the said indenture of the 25th day of March, 1823), from henceforth for all the residue now to come of the said term of forty years, at and under and subject to the rents and covenants, conditions and agreements, by and in the said indenture of the 25th day of March, 1823, reserved and contained, and which from the day of the date of these presents ought, on the tenant's or lessee's part, to be paid,

tures and machinery.

—and the minerals raised.

—And all the estate, &c.

First Habendum of the property subject to the terms.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

kept, observed, and performed, and subject also to the proviso hereinafter contained for redemption of the same premises, AND TO HAVE, HOLD, USE, AND ENJOY all such and so many, and such part and parts of the said buildings, erections, machinery, fixtures, coal, slack, ironstone, coke, mines, and of all and singular other the premises hereinbefore assigned, or expressed and intended so to be, as were not by the said indenture of the 25th day of March, 1823, demised, or expressed and intended so to be, and are not or shall not be fixed to the freehold of the said premises, and shall belong to the tenant, unto the said G. H. and I. K., their executors, administrators, and assigns for ever, subject nevertheless to the provisos, agreements, conditions, and covenants by and in the said indenture of the 25th day of March, 1823, declared and contained of and concerning the same or any of them, or any part or parts thereof, and subject also to the proviso hereinafter contained for redemption of the same premises (*e*), [*similar assignment and habendums for the second lease, adding to each habendum the following expression*], "but freed and discharged from all right or equity of redemption which may be subsisting in the said premises lastly hereinbefore assigned, or expressed and intended so to be, or any of them, under or by virtue of the said indenture of the —— day of ——, 1836, subject nevertheless to the proviso hereinafter contained for redemption of the same premises"]: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said A. B., and the said G. H. and I. K., and the true intent and meaning of them, and of these presents, nevertheless is, that if the said A. B., his executors, administrators, or assigns, shall and do pay or cause to be paid to the said G. H. and I. K., their executors, administrators or assigns, the sum of £30,000, and the sum of £1,500 as and for one year's inter-

Second Habendum of the property not subject to the terms.

Witnesseth secondly,—assignment of second lease, &c.

Proviso for redemption.

(*e*) The reason for having two habendums is obvious, as part of the premises are to be held for a term and part absolutely. In framing these special habendums, great regard must, of course, be had to the terms of the lease. For some information as to the law relating to machinery and fixtures, see supra, p. 500, n. (*a*).

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

est for the same at the rate of £5 for £100 for a year, making together the sum of £31,500, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £750, being half a year's interest for the said sum of £30,000 at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £30,750, residue thereof, being the whole of the said principal sum of £30,000, and another half-year's interest for the same at the rate aforesaid, on the —— day of ——, then next following, which will be in the year ——, without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, or any other matter, cause, or thing whatsoever, then and in such case they the said G. H. and I. K., their executors, administrators, or assigns, shall and will, at any time after such payment shall have been so made as aforesaid, upon the request and at the proper costs and charges of the said A. B., his executors, administrators or assigns, re-assign all such and so many and such part and parts of the said hereditaments and premises hereinbefore assigned or expressed and intended so to be, as are comprised in or shall be subject to the said terms of forty years and twenty-one years respectively, unto the said A. B., his executors, administrators, and assigns, for all the residue which shall be then unexpired of and in the said terms of forty years and twenty-one years respectively, and all such and so many and such part and parts of the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, as are not comprised in the said terms of forty years and twenty-one years, or either of them, unto the said A. B., his executors, administrators, and assigns, and as to all the said premises free from all incumbrances whatsoever, made, done, or committed by the said G. H. and I. K. or either of them, their or either of their executors, administrators, or assigns, or any of them, and so as for the doing thereof the said G. H. and I. K., or either of them, their or either of their executors, administrators, and assigns, or any of them, be not com-

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

pelled or obliged to go or travel from the place or places of their or his usual abode or dwelling, and so as that the said A. B., his executors, administrators, or assigns, do, at his and their own costs and charges, procure such licence or licences for such re-assignments as shall be necessary (*f*). [*Covenant by* A. B. *with* G. H. *and* I. K., *their executors and administrators, for payment to the said* G. H. *and* I. K., *their executors, administrators, and assigns, of the mortgage money and interest, (supra, p.* 469)—*covenants by* A. B. *with* G. H. *and* I. K., *their executors, administrators, and assigns, that the leases are valid and the rents and covenants paid and performed,* "except as to the arrears of mine-rent hereinbefore mentioned to be due on the said indenture of the 29th day of December, 1823;"—*for right to assign—for quiet enjoyment after default—free from incumbrances—for further assurance —for payment of the rents and performance of the covenants, and for indemnifying against them,* " or for, upon account, or in respect of, the covenants entered into by the said G. H. and I. K. with the said E. F., by the said indenture of even date herewith intended to be endorsed on the counterpart of the said indenture of the 29th day of December, 1823; and that the said A. B., his heirs, executors, or administrators, shall and will repay on demand all such monies as they the said G. H. and I. K., or either of them, their or either of their heirs, executors, administrators, or assigns, shall pay on account of the rents and covenants of the said leases, or either of them, or any covenants contained in these presents relating thereto, with interest for the same monies after the rate of £5 per cent. per annum, and that all such monies and interest shall be a charge on the said mortgaged premises, which shall not be redeemable until the same shall be paid." *For these covenants, see supra,* pp. 545, 559. *Power of Sale, inserting, at the end of the first clause, the following provision:*

Power of sale.

" Provided always, and it is hereby agreed and declared,

(*f*) This condition, although worded generally, might with propriety have been restricted to the premises comprised in the term of forty years. (See supra, n. (*d*)).

that the said G. H. and I. K., their executors, administrators, or assigns, shall not and will not, under or by virtue of the power of sale hereinbefore contained, make any sale of such part of the said premises hereinbefore assigned as are comprised in the said term of forty years, without the licence and consent of the said C. D., his heirs or assigns, or other the person or persons entitled to the reversion expectant on the said term of forty years, or of such part of the said premises hereinbefore assigned as are comprised in the said term of twenty-one years, without the consent of the said E. F. or his heirs, or other the person or persons entitled to the reversion expectant on the said term of twenty-one years, or other the term for the time being subsisting in the same premises:" PROVIDED ALWAYS nevertheless, and it is hereby agreed and declared between and by the said A. B. and the said G. H. and I. K., and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B., his executors, administrators, or assigns, shall and do pay or cause to be paid to the said G. H. and I. K., their executors, administrators, or assigns, the sum of £750, part of the said principal sum of £30,000, together with interest on the said principal sum of £30,000 from the day of the date of these presents up to the —— day of ——, which will be in the year ——, on the said —— day of ——, and the like sum of £750, further part of the said principal sum of £30,000, or such smaller sum, part of the said principal sum of £30,000, as shall for the time being remain unpaid, together with interest on so much of the said principal sum of £30,000 as shall for the time being remain unpaid on each and every of the days which shall be appointed by the —— shire iron-masters for their quarterly meeting at the town of ——, then and in such case, and so long as the said quarterly instalments of principal money and interest as aforesaid shall be duly paid on the days hereinbefore appointed for payment thereof, or on the quarterly days to which the same shall be postponed under the provisos hereinafter contained, and the said A. B., his executors, administrators, or assigns, shall pay, observe, and perform the rents, covenants, and agreements

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

Proviso for payment of the mortgage-money by instalments.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

hereinbefore by him covenanted to be paid, observed, and performed (*g*), and shall save, defend, and keep harmless and indemnified the said G. H. and I. K., their heirs, executors, administrators, and assigns, and every of them, in respect of the said rents, covenants, and agreements, according to his covenant in that behalf hereinbefore contained, and shall observe and perform the other covenants in these presents contained, and by him the said A. B. to be observed and performed, they the said G. H. and I. K., their executors, administrators, and assigns, or any of them, shall not and will not commence or prosecute any action, suit, or other proceeding upon the said covenant hereinbefore contained for payment of the said sum of £30,000, and shall not and will not exercise the said power of sale hereinbefore contained, or file any bill for foreclosure of the premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof, and shall not and will not take any other proceeding, either at law or in equity, to compel payment of the said sum of £30,000, or of such part thereof as shall for the time being remain unpaid (*h*): PROVIDED ALWAYS, and it is hereby agreed

Proviso for postponement

Variation.

(*g*) The covenant should not be to pay and perform, *or* to indemnify. (See supra, p. 389, n. (*l*)).

If the draft contain only covenants by the mortgagor, entered into independently and without reference to the covenants in a lease, the form should be:—

"shall observe and perform the covenants and agreements in these presents contained, and by the said A. B., his executors, administrators, or assigns, to be observed and performed, they the said G. H. and I. K. &c."

Form of a security for the payment of a debt by instalments.

(*h*) When it is intended that money shall be paid by instalments, the parties must be understood to mean, that the instalments shall be regularly paid, and that in default of regular payment the creditor shall be at liberty to sue for his whole debt. To effect this arrangement, a bond or covenant should be taken for the payment of the entire sum at an appointed time, and the effect be qualified by a subsequent proviso, explaining the real intent of the parties. This places both debtor and creditor in convenient situations; for the debtor has the full advantage of the contemplated delay if he fulfil his engagement, and the creditor is restored to his unqualified rights if the debtor fail in making good the

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

and declared between and by the parties to these presents, that in case the present or any future arrears of the said mine-rent of £1,000 reserved by the said indenture of the 29th day of December, 1823, shall be required to be paid up by the said E. F., his heirs or assigns, before a corresponding portion of the said mine shall have been worked, considering £1,000 to be the rent payable for each acre of the said mine, then and in such case, and so often as the same shall happen, the payment of the said instalments of £750 shall be postponed in point of time so and in such manner as if such forehand payments to the said E. F., his heirs or assigns, had been payments made on account of the said instalments of £750: PROVIDED ALWAYS, and it is hereby further agreed and declared, that when and so soon as the arrears required to be paid up in respect of the said rent of £1,000 shall be paid up to the time required, before a corresponding quantity of mine shall be actually worked, the payment of the said quarterly instalments of £750 shall recommence and be paid till full payment of the said sum of £30,000, or until the

of the payment of instalments in certain events.

—and for the instalments again to become payable.

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payment of the instalments. For the purpose of framing mortgages, the arrangement is peculiarly convenient, because it enables the draftsman to use his common forms of proviso, covenants, and power of sale, and to qualify their operation by a single special clause; whereas, if he attempt to alter the frame of his proviso, he not only places his client, the mortgagee, in a less advantageous position, but he is hampered throughout his draft by the necessity of adapting his covenants and power of sale to meet the unusual shape of the proviso.

Quarterly payment of interest.

The effect of the stipulation in the text is, that interest on the whole sum unpaid shall be paid quarterly; and it may be doubted, whether the law will permit of such an agreement in a mortgage-deed. (See supra, p. 510, n. (*f*). But it is to be remarked, that this is not the original proviso, and that if the mortgagor fail to pay the interest according to this sub-agreement, the only consequence will be, that he will be placed in the same situation he would have been if this proviso had been altogether absent.

It is true, that the special proviso for quiet enjoyment until default, (see infra), to some degree negatives this view of the matter; but if this be deemed of any moment, the common proviso for quiet enjoyment until default, may be substituted without any material prejudice to the remedies of the mortgagee.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

instalments shall be again interrupted by a further demand of such forehand payments of rent as aforesaid, after which they shall recommence, and so from time to time till the whole of the principal monies and interest intended to be hereby secured shall be paid: PROVIDED ALWAYS, and it is hereby expressly declared, that nothing herein contained shall in anywise hinder or prevent, or be taken to hinder or prevent, the said E. F., his heirs or assigns, from calling for or compelling payment of the whole of the said arrears of rent or any part thereof, or any rent hereafter to accrue due on the said indenture of the 29th December, 1823, when and as he or they shall think fit: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said A. B. and the said G. H. and I. K., and the true intent and meaning of them and of these presents nevertheless is, that it shall be lawful for the said A. B., his executors, administrators, and assigns, peaceably and quietly to have, hold, occupy, and enjoy all the said premises hereinbefore assigned, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof to his and their own use until default shall be made in payment of some or one of the said instalments of £750, or some part thereof, or of the interest for the time being payable, or of some other principal monies or interest intended to be hereby secured after the day or time when the same shall be payable, according to the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said G. H. and I. K., their executors, administrators, or assigns, or by any other person or persons whomsoever, lawfully or equitably claiming or to claim by, from, or under them, or any of them: AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the premises, he the said E. F. hath acquitted, released, and discharged, and by these presents doth acquit, release, and discharge the said A. B., his heirs, executors, and administrators, and his and their and every of their estates and effects, of and from all and all manner of actions, suits, accounts, reckonings, damages, expenses, claims, and de-

The lessor not to be affected by the two last provisos.

Proviso for quiet enjoyment by the mortgagor until default.

Witnesseth, further release of a former breach of covenant.

mands whatsoever, for or on account or in respect of the said underlease or demise so made by the said A. B. as aforesaid, in and by the said indenture of the —— day of ——, without the licence, approval, or consent of the said E. F., or for or on account or in respect of the breach of his said covenant in that behalf thereby committed or incurred by the said A. B., [but so nevertheless that this present release shall not license or authorize, or be taken or deemed to license or authorize any further or other demise, assignment, or underlease, to be made by the said A. B. of the premises comprised in the said indenture of the 29th day of December, 1823, or any of them, or any part therof (*i*).] IN WITNESS &c.

OF MINE-LEASE—MONEY TO BE PAID BY INSTALMENTS.

LXIV.

MORTGAGE *of* COPYHOLDS, (*subject to a* PRIOR *Mortgage*) (*a*), *to* BANKERS *for securing an* ACCOUNT CURRENT.

COPYHOLDS FOR AN ACCOUNT CURRENT.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D. and E. F., of &c., Parties.

(*i*) The words in brackets appear to be the offspring of abundant caution, and may safely be omitted.

(*a*) There is always considerable risk in taking a second mortgage, although this risk in the case of copyholders is diminished by the power which the mortgagee possesses of getting a notice of his security put upon the court-rolls. In the case of freeholds, if the first mortgagee (who of course has the custody of the title-deeds) will so permit, a notice of the second mortgage may be endorsed on the first mortgage, or some other principal title-deed. But unless some notice of the second mortgage can be affixed to the title, there is danger that a third mortgagee, without notice, may pay off the first and get the legal estate, which would give him priority over the second, not only for the amount of the first mortgage, but also for his own advances. And a notice

Mortgage of an equity of redemption.

COPYHOLDS FOR AN ACCOUNT CURRENT.

bankers and co-partners, [*mortgagees*], of the other part: WHEREAS, by an indenture bearing date the —— day of ——, and made or expressed to be made between the said A. B. of the one part, and the said G. H. of the other part, in consideration of the sum of £—— by the said G. H. paid to the said A. B., the said A. B. did for himself, his heirs, executors, and administrators, covenant with the said G. H. and his heirs, that he the said A. B. or his heirs would, at or before the next court to be holden in and for the manor

Recital of prior covenant to surrender in mortgage.

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to the first mortgagee personally is of no avail against the third mortgagee obtaining the legal estate. (*Peacock* v. *Burt*, Coote on Mortgages, 693, 2nd edit.). A notice, however, endorsed by a third mortgagee on the first mortgage-deed, does not avail against a second mortgagee, although the third mortgagee have no notice of the second. (*Jones* v. *Jones*, 8 Sim. 333). For it is not incumbent on a mortgagee of an equity of redemption to give notice of his charge to the owner of the legal estate, although an assignee of a chose in action is bound to do so. (Supra, p. 374, n. (*d*)). The equity of redemption is the subject of conveyance, and is held by title; whereas a chose in action is a mere subject of contract, which can only effectually pass, by delivery after it has been reduced into possession. (See supra, p. 374, n. (*d*)). But although the incumbrancers on the equity of redemption rank according to their priority in point of time, unless one not having notice of the other obtains the legal estate, yet a mortgagee of an equity of redemption should never fail to inquire of the first mortgagee the amount of the sum due to him, and whether he has any other claims which may affect the estate, and to give him notice of the second mortgage; for a first mortgagee is entitled to tack sums which became due to him at any time before he receives notice of the subsequent incumbrance.

There is said to be a peculiarity attending mortgages to secure future advances, for it is alleged, that if, subsequently to such a mortgage, a second mortgage be made to a person *having notice of the first*, and the first mortgagee, *having notice of the second*, afterwards make further advances, he may tack those advances as against the second mortgagee, because it was the folly of the latter to lend on such a security. *Gordon* v. *Graham*, 7 Vin. Abr. 52, is cited as the authority for this position, (Coote on Mortgages, 513, 2nd edit.); but it appears, that, in spite of the decision, it was ultimately ordered that the Master should report what money was lent by the first mortgagee after he had notice of the second, and the point can therefore hardly be considered to have been decided.

See further, on this subject, Coote on Mortgages, 2nd edit. Book II. Ch. xiii.; Book IV. and Book V. Ch. i.; and ante, Vol. I. Art. MORTGAGES. See, too, infra, n. (*b*).

COPYHOLDS FOR AN ACCOUNT CURRENT.

of ——, in the county of ——, well and effectually surrender or cause to be surrendered into the hands of the lord or lady, lords or ladies of the said manor, according to the custom thereof, the hereditaments hereinafter particularly mentioned and covenanted to be surrendered, with their appurtenances, to the use of the said G. H., his heirs and assigns, to be holden according to the custom of the said manor, and by and under the rents, fines, heriots, suits, and services therefore due and of right accustomed, but subject to the proviso in the said indenture now in recital contained for making void the said surrender, on payment by the said A. B., his heirs, executors, administrators, or assigns, to the said G. H., his executors, administrators, or assigns, of the sum of £—— at the time therein mentioned, with interest for the same after the rate of £— per cent. per annum, at the times and in manner therein mentioned: AND WHEREAS no surrender was made in pursuance of the said covenant: AND WHEREAS the said sum of £—— still remains due and owing on the security of the said indenture of the —— day of ——, but all interest for the same up to the day of —— last has been paid: AND WHEREAS the said A. B. has for some time past kept an account with the said C. D. and E. F., as bankers as aforesaid, and the said C. D. and E. F. have from time to time paid or advanced divers sums of money to or on account of the said A. B., and the said A. B. has also become indebted to the said C. D. and E. F. for interest, commission, and other matters: AND WHEREAS, upon an account this day stated between the said A. B. and the said C. D. and E. F., as bankers as aforesaid, there is due and owing from the said A. B. to the said C. D. and E. F. the sum of £——, and no more: AND WHEREAS it is probable that other sums may hereafter become due and owing from the said A. B. to the said C. D. and E. F.: AND WHEREAS it has been agreed that the re-payment of the said sum of £——, and of all such sums as shall in manner hereinafter mentioned become due from the said A. B. to the said C. D. and E. F., or the persons or person for the time being carrying on the business of the said banking-house, their or his executors, administrators, or

—that no surrender was made.

—that mortgage debt remains unpaid.

—that the mortgagor is indebted to the new mortgagees.

—of the amount of existing debt.

—of the prospect of fresh advances.

—of agreement for mortgage.

COPYHOLDS FOR AN ACCOUNT CURRENT.

assigns, shall be secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of £—— so due and owing from the said A. B. to the said C. D. and E. F. as aforesaid, and for securing the re-payment thereof, and of all such sums of money as shall in manner hereinafter mentioned become due or owing from the said A. B. to the said C. D. and E. F., or the persons or person for the time being carrying on the business of the said banking-house, their or his executors, administrators, or assigns, he the said A. B., &c., [*covenant to surrender the copyholds to the use of C. D. and E. F., their heirs and assigns, supra, p.* 566 (*b*):] BUT SUBJECT and without prejudice to the conditional surrender to be made to the use of the said G. H., his heirs and assigns, in pursuance of the hereinbefore recited covenant: AND SUBJECT ALSO to a proviso or condition for making void the said surrender hereby covenanted to be made, if the said A. B., his heirs, executors, administrators, or assigns, shall and do, on demand in writing signed by the said C. D. and E. F., or other the persons or person for the time being carrying on the business of the said banking-house, or any of them, their or any of their executors, administrators, or assigns, and left on the premises hereby covenanted to be surrendered, or at the office of ——, in ——, or at any time, without such demand having been left, pay or cause to be paid unto the said C. D. and E. F., or the persons or person for the time being carrying on the business of the said banking-house, their or his executors,

Witnesseth, Consideration.

Covenant to surrender.

Subject to the first mortgage.

Proviso for redemption.

Mortgages of the equity of redemption of copyholds.

(*b*) It is usual to take all mortgages of copyholds by a covenant to surrender, and there is no safety for either a first or subsequent mortgagee, unless an actual surrender be made, so as to put the mortgage on the court-rolls. Even, in the case of a first mortgage, if before the surrender a second mortgagee, without notice of the covenant, should take a surrender to himself, and be admitted, he would obtain priority; for he would have an equal equity with the first mortgagee, and would have the legal estate. (*Orwick* v. *Plumer*, 5 Bac. Abr. 43; supra, p. 304, n. (*a*).) To the second mortgagee the surrender serves as a notice of his mortgage on the court-rolls. (See, further, on Mortgages of Copyholds, supra, p. 565, n. (*a*), and p. 568, n. (*c*)).

administrators, or assigns (*c*), the balance which on the account-current of the said A. B. with the said banking-house shall for the time being be due or owing from the said A. B., his executors or administrators, for the said sum of £——, or for bills or notes to be hereafter discounted or paid, or other loans, credits, or advances made to or for the accommodation or at the request of the said A. B., his executors or administrators, or for interest, commission, or other lawful charges and expenses (*d*); AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors and administrators, that, on demand in writing signed by the said C. D. and E. F., or the persons or person for the time being carrying on the business of the said banking-house, or any of them, their or any of their executors, administrators, or assigns, and left on the premises hereby covenanted to be surrendered, or at the office of ——, in ——, he the said A. B., his heirs, executors, or administrators, shall and will pay or cause to be paid to the said C. D. and E. F., or the persons or person for the time being carrying on the business of the said banking-house, their or his executors, administrators, or assigns, the balance which on the account-current of the said A. B. with the said banking-house shall for the time being be due or owing from the said A. B., his executors or administrators, for the said sum of £——, or for bills or notes to be hereafter discounted or paid, or other loans, credits, or advances made to or for the accommodation or at the request of the said A. B., his executors or administrators, or for interest, commission, or other lawful charges and expenses; and, in case such balance shall not be paid on such demand, shall and will pay or cause to be paid such interest, after the rate of £5 per cent. per annum, as shall

COPYHOLDS FOR AN ACCOUNT CURRENT.

Covenant for payment of mortgage-money.

—and interest.

(*c*) With respect to the effect of a change of partners on a security given to a firm, see supra, p. 521, n. (*k*).

(*d*) As to the principles on which the proviso and covenant for payment should be framed in mortgages of this kind, see supra, p. 510, n. (*f*).

COPYHOLDS FOR AN ACCOUNT CURRENT.

legally accrue due upon such balance or any part thereof, up to the time at which the same shall be paid, [*covenants by A. B. with C. D. and E. F., their heirs and assigns—for title,* "other than the hereinbefore recited covenant for conditional surrender"—*for right to surrender—for quiet enjoyment after default against all persons,* "other than the said G. H., his heirs or assigns,"—*free from incumbrances,* "except the said sum of £—— and interest, so secured to the said G. H., his executors, administrators, and assigns, as aforesaid," *by all persons,* "other than the said G. H., his heirs and assigns," *and for further assurance—proviso for quiet enjoyment until default, supra, pp. 567 and 484.* [*Power of sale, supra, p. 518*]: AND IT IS HEREBY agreed and declared that these presents are intended to be a security for the balance, which shall for the time being be due or owing on the account-current of the said A. B., his executors or administrators, with the said banking-house of the said C. D. and E. F., whether the business of the said banking-house shall be carried on by the present partners or by one of them, or by them or either of them, together with any other persons or person, or by any other persons or person only (*e*): AND IT IS HEREBY further agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the persons or person for the time being carrying on the business of the said banking-house, for any sum or sums of money intended to be secured by these presents, shall be a sufficient and effectual discharge or sufficient and effectual discharges to the said A. B., his heirs, executors, administrators, or assigns, or other the persons or person paying the same for the money therein respectively expressed to be received, so that he or they shall not be concerned to see to the application of such money, nor be answerable for any loss, mis-application, or non-application thereof (*f*): AND IT IS HEREBY lastly agreed and

Covenants for title.

Declaration that the security shall not be affected by a change in the persons composing the firm.

Declaration as

(*e*) See supra, p. 521, n. (*k*).

Mortgages to partners.

(*f*) As it appears on the face of the deed that the mortgagees are co-

declared, that these presents are intended to be a security for the balance to be due on the account-current aforesaid; and that, for the purposes of the act imposing a duty ad valorem on such mortgage securities, the total amount of the money to be ultimately recoverable hereupon shall not exceed £—— (*g*). IN WITNESS &c.

COPYHOLDS FOR AN ACCOUNT CURRENT.

to amount to be recoverable.

LXV.

MORTGAGE *of a* REVERSIONARY INTEREST *in a Sum of* STOCK (*a*).

REVERSIONARY INTEREST IN STOCK.

THIS INDENTURE, &c., BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., [*mortgagee*], of the other part: [*recites the will under which the mortgagor is entitled—death of the testator and probate of the*

Parties.

Recitals of title.

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partners in trade, and that the money advanced belongs to them on the partnership account, it is impossible to state that the money is held on a joint account; (see supra, p. 480, n. (*a*)). And as in partnership stock there is no survivorship (Collyer's Law of Partnership, Book II. Ch. 1. s. 1); the proviso in the text is added to enable the persons for the time being carrying on the business of the bank to discharge the mortgagor. As to how far this will render it necessary for the mortgagor to ascertain and shew in his future title, who were the persons for the time being carrying on the business of the bank, see supra, p. 507, n. (*d*).

(*g*) With respect to the use and effect of this proviso, see the Stamp Act, 55 Geo. 3, c. 184, Art. MORTGAGE; and supra, p. 523, n. (*l*).

(*a*) Before any money is advanced upon a security of this description, inquiry must be made of the legal holders of the fund as to the existence of any prior charge on it, and notice must be given to them of the security immediately upon its completion. (See supra, p. 374, n. (*d*)). A reversion is an inconvenient subject for mortgage, because it yields no income for the discharge of the interest.

REVERSIONARY INTEREST IN STOCK.

—further recital of title.

will:] AND WHEREAS the whole of the real and personal estate, by the said will of the said [*testator*] appointed or bequeathed for the benefit of the said [*tenant for life*], and her children as aforesaid, has been conveyed and distributed to or among the persons entitled thereto under the said will, except a sum of £——, *3l.* 10*s.* per cent. Reduced Bank Annuities, now standing in the names of the said [*trustees*], and which said sum of £——, *3l.* 10*s.* per cent. Reduced Bank Annuities, subject to the life-interest therein of the said [*tenant for life*], now belongs to her five children, the said A. B., &c., in equal shares as tenants in common (*b*):

Recital of agreement for loan.

AND WHEREAS the said C. D. hath agreed to advance and lend to the said A. B. the sum of £——, upon having the re-payment thereof, with interest for the same after the rate of £— per centum per annum, secured in manner hereinafter mentioned:

Witnesseth.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— &c., the receipt &c., (*supra, p.* 465),

Assignment.

—of mortgagor's reversionary share in fund.

he the said A. B. hath assigned and by these presents doth assign unto the said C. D., his executors, administrators, and asssigns, ALL THAT one equal fifth part or share to which the said A. B. is entitled, expectant on the death of the said [*tenant for life*], of and in the said sum of £——, *3l.* 10*s.* per cent. Reduced Bank Annuities, and of and in the money to arise by the sale thereof, and of and in the stocks, funds, and securities in or upon which the same shall be invested, and of and in

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Remarks on the recitals.

(*b*) The recitals in the text are irregular. It would have been more correct to have stated all the facts, so that the mortgagor's interest might have been deduced from them, instead of merely stating his interest, as is done in the text. (See supra, p. 427). If it were absolutely necessary to make the recital very brief, the best course would have been to have stated, "that, by virtue of the will of ——, the mortgagor, as one of the five children of ——, was entitled to an equal fifth part of a sum of £——, standing in the name of ——." It is of the utmost importance to give an accurate description, both in the recitals and the witnessing part, of the fund intended to be assigned. An instance of the ill effects of inaccuracy in an assignment, may be seen in the case of *Lucas* v. *Bond*, 2 Keen, 136; supra, p. 90.

the dividends, interest, and annual produce thereof, AND ALL THE ESTATE, &c. (*c*): TO HAVE AND TO HOLD the said one-fifth part or share, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, subject to the proviso for redemption hereinafter contained: (that is to say), PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said A. B. and C. D., and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B., his executors, administrators, or assigns, shall and do pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, the sum of £——, and the sum of £—— as and for one year's interest for the same at the rate of £— for £100 by the year, making together the sum of £——, in the parts, shares, and proportions, on or at the days or times hereinafter mentioned, (that is to say), the sum of £——, part thereof, being half-a-year's interest for the said sum of £—— at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year ——, and the sum of £——, residue thereof, being the whole of the said principal sum of £—— and another half-year's interest for the same after the rate aforesaid, on the —— day of —— then next following, and which will be in the year ——, without any deduction or abatement whatsoever, then and in such case the assignment hereinbefore contained shall be absolutely void (*d*), [*covenant for payment of mortgage*

REVERSIONARY INTEREST IN STOCK.

Habendum.

Proviso for redemption.

Covenant for payment of

(*c*) It is a very common practice to insert a power of attorney in all assignments of choses in action. (See the forms, supra, pp. 252 and 372, and infra, p. 613). But this indiscriminate use of the form is erroneous; for a power of attorney is only available or needed when the remedy is to be in a court of law. The assignee of any interest can sue in a court of equity, altogether independently of a power of attorney; and therefore, where the interest assigned is clearly equitable, so as not to be within the reach of any legal remedy, a power of attorney, whether long or short, is mere surplusage.

Powers of attorney when required.

(*d*) There is no necessity for the employment of this form of proviso, (see supra, p. 468, n. (*i*)); but it has been retained in the present case as an example of a compendious form, which circumstances may render it

REVERSIONARY INTEREST IN STOCK.

money and interest, supra, p. 469]: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to assign the said part or share and premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, and free from all incumbrances whatsoever: AND MOREOVER, THAT he the said A. B., and his executors and administrators, and all and every other persons and person whosoever having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or interest, of, in, or to the part or share and premises hereinbefore assigned, or expressed and intended so to be, or any part thereof, shall and will from time to time and at all times hereafter, upon the request of the said C. D., his executors, administrators, or assigns, but at the costs and charges of the said A. B., his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring the said part or share and premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised, or devised and required: AND IT IS HEREBY agreed and declared, that, if default shall be made in payment of the said sum of £—— or the interest thereof, or any part thereof respectively, at the times hereinbefore appointed for the payment of the same respectively, it shall be lawful

mortgage-money and interest.

Covenant for right to assign.

—and for further assurance.

Power of sale.

useful to employ. The usual proviso for re-assignment, as given in the other precedents, may easily be substituted.

for the said C. D., his executors, administrators, or assigns, at any time or times after such default shall have been so made, without any further consent on the part of the said A. B., his executors, administrators, or assigns, to make sale and dispose of the said fifth part or share hereinbefore assigned, or expressed and intended so to be, of or in the said sum of £——, 3*l.* 10*s.* per cent. Reduced Bank Annuities, and other the premises hereinbefore assigned, or expressed and intended so to be, either by public auction or private contract, with full power upon such sale to make any stipulations, as to title or otherwise, which he or they shall deem necessary; and also with full power to buy in the said premises at any sale by public auction, or to rescind any contract for the sale of the same premises, and to re-sell the premises so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby; and that for the purposes aforesaid or any of them it shall be lawful for the said C. D., his executors, administrators, or assigns, to make and execute, or cause to be made and executed, all such agreements, deeds, assignments, and assurances, as he the said C. D., his executors, administrators, or assigns shall think fit: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said C. D., his executors, administrators, or assigns, will not and shall not execute the power of sale hereinbefore contained, unless and until he or they shall have previously given a notice in writing to the said A. B., his executors, administrators, or assigns, to pay off the monies which for the time being shall be due on the security of these presents, or left a notice in writing to that effect at the office of ——, in ——, and default shall have been made in payment of such monies or some part thereof for the space of six calendar months, to be computed from the time of giving or leaving such notice, or unless and until some half-yearly payment of interest which shall become due on the security of these presents, or a part of some such half-yearly payment, shall have become in arrear for the space of three calendar months after the day on which the same shall become due: PROVIDED ALSO, and it

REVERSIONARY INTEREST IN STOCK.

Power not to be exercised till certain events have happened.

REVERSIONARY INTEREST IN STOCK.

Purchaser not to be bound to see that events have happened.

is hereby agreed and declared, that, upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers thereat shall not be bound to see or inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any money remains due on the security of these presents, or otherwise as to the propriety or regularity of such sale; and, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers thereat, be deemed and taken to be within the aforesaid power in that behalf, and be valid and effectual accordingly, and the remedy of the said A. B., his executors, administrators, or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, shall be in damages only:

Mortgagee's receipts to be discharges.

AND IT IS HEREBY also agreed and declared, that, upon any such sale as aforesaid, the receipt or receipts in writing of the said C. D., his executors, administrators, or assigns, for the purchase-money of the premises to be sold, shall be an effectual discharge or effectual discharges to the purchaser or purchasers for the money therein respectively expressed to be received, and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, or be answerable for any loss, mis-application, or non-application thereof:

Trusts of the purchase-money.

AND IT IS HEREBY further agreed and declared, that the said C. D., his executors, administrators, and assigns, shall hold all and singular the monies which shall arise from any sale which shall be made as aforesaid upon the trusts following, (that is to say), upon trust, in the first place, by, with, or out of the same monies to reimburse himself or themselves, or pay or discharge all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto; and in the next place, upon trust to apply such monies in or towards satisfaction of all and singular the monies which for the time being shall be due on the security of these presents, and then upon trust to pay the surplus (if any) of the monies to

REVERSIONARY INTEREST IN STOCK.

arise from such sale or sales as aforesaid unto the said A. B., his executors, administrators, or assigns, for his and their proper use and benefit: AND IT IS HEREBY also agreed and declared, that the aforesaid power of sale shall or may be exercised by any person or persons who for the time being shall be entitled to give a discharge for the monies which for the time being shall be due on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said C. D., his executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the execution of the aforesaid power or trusts, or any of them: PROVIDED ALSO, and it is hereby lastly agreed and declared, that the aforesaid power of sale or anything herein contained shall not in anywise prejudice or affect the right of the said C. D., his executors, administrators, or assigns, to foreclose the equity of redemption of the premises aforesaid (*e*). IN WITNESS &c.

Power of sale may be exercised by any person capable of giving a receipt for the money.

Mortgagee not to be answerable for involuntary losses.

Power of sale not to affect right of foreclosure.

(*e*) A mortgage of this kind should always contain a power of sale, for there is no other convenient mode of turning the security to account before the reversionary interest has fallen into possession. In case of an application to a court of equity, the remedy granted, it seems, would be a sale and not a foreclosure; but it may be prudent to retain the provision as to foreclosure. (*How* v. *Vigures*, 1 Ch. Rep. 33; 15 Vin. 475).

LXVI.

POLICY OF ASSURANCE.

ASSIGNMENT *of a* POLICY *of* ASSURANCE *by way of* MORTGAGE, *for securing a* SUM ALREADY DUE *and* FUTURE ADVANCES (*a*).

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c.,

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Security for future advances as distinguished from an account-current.

Observations on framing mortgages of policies of assurance.

(*a*) It should be observed, that the precedent in the text is not of a mortgage for an account-current, like Precedents LVI. and LXIV.; it merely contemplates future advances by the mortgagee. The frame of the draft too is rather peculiar; for it commences with a covenant for the payment of the principal monies and interest, and then contains an assignment of the policy as a further security. There is no proviso for redemption, but in lieu thereof trusts are declared which render the policy an available security for the mortgagee. There is, however, no reason why a security on a policy of assurance should not be made in the shape of a regular mortgage with a proviso for redemption; (see the last Precedent); which would raise by implication the same trusts of the monies payable under the policy, as are expressly declared in the form in the text. A power of sale, (which may be adapted from the form in the last precedent), should be contained in every security on a policy of assurance, for, with the exception of any bonus which may be declared, a sale is the only way in which a policy can be made available in the life-time of the assured. It is not unusual to introduce into the trusts of the purchase-money some words which may render them applicable to the monies to become payable under the policy itself. If there be a proviso for redemption this is unnecessary; but if the draft be framed after the form in the text, it would, of course, be needful to adopt this course, in order to obviate the necessity of declaring the same trusts twice over. Of course, the monies to become payable under the policy itself should not be made applicable to defray the costs of a sale.

Payment by an assurance-office to a creditor of the amount of a policy on the life of a debtor, is not a satisfaction of the debt.

Some of the principal points in the law respecting policies of assurance are noticed *supra*, pp. 90, 91, and p. 374, n. (*d*). It is to be observed, however, that although, if a creditor insure his debtor's life, and the debt is paid by the executors, the creditor cannot recover against the assurance office; (*Godsall* v. *Boldero*, 9 East, 72); yet the reason of this is, because the contract with the office is for an indemnity against loss, and if there be no loss there can be no indemnity. And, therefore, the converse of the decision in *Godsall* v. *Boldero*, does not appear

POLICY OF ASSURANCE.

[*mortgagee*], of the other part: WHEREAS the said A. B. is entitled to a policy of assurance on his own life in the —— Assurance Society, bearing date the —— day of ——, numbered ——, for the sum of £——, and under the annual premium of £——: AND WHEREAS the said A. B. is indebted to the said C. D. in the sum of £—— for monies advanced, and the said C. D. may hereafter make further advances to or for the use or on the account of the said A. B.: AND WHEREAS the said A. B. hath agreed to secure in manner hereinafter mentioned the re-payment to the said C. D., his executors, administrators, or assigns, of the said sum of £—— so due and owing as aforesaid, with interest for the same after the rate of £—— per cent. per annum, and also of such other sum or sums of money as the said C. D., his executors or administrators, shall or may hereafter advance, lend, or pay to or for the use or on the account of him the said A. B., or as may

Recital of policy.

—of debt and probability of further advances.

—of agreement for security.

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to hold good; and it has been decided in the Irish Court of Chancery, that where a creditor had insured his debtor's life, and had been paid by the office, he could not be compelled to set off the sum received by him from the office less the amount of the premiums and interest against the debt due. (*Humphrey* v. *Arabin*, 1 Lloyd & Goold, Cas. Tem. Plunk. 318).

Value of a policy of assurance as a security.

A policy of assurance alone is a very insufficient security, inasmuch as it yields no income for the payment of interest; and, generally speaking, produces a very small sum if sold in the lifetime of the assured. But policies are of great value as collateral securities when coupled with some annual income, (as a life-interest), which may serve as a fund for the payment of the premiums. (See infra, Precedents LXVII. and LXVIII). But even then their value is subject to be destroyed by any act of the mortgagor which transgresses the rules of the office and vitiates the policy. If the policy be effected for the occasion, it should always be in the name of the mortgagee, which removes some of the risks, (supra, p. 91), and avoids the necessity of an assignment. The security will then consist of the covenant for payment of the principal and interest, of a declaration of trust of the policy, a power of sale, and covenants for payment of the premiums. The draft may be easily adapted from the form in the text; and the subsequent Precedents LXVII. and LXVIII., may likewise furnish assistance.

Precaution to be observed.

If the policy be a subsisting policy at the date of the security, inquiry must of course be made of the assurance office as to the existence of any prior charge; and notice of the security, when effected, must be given to the office. (See supra, p. 374, n. (*d*)).

POLICY OF ASSURANCE.

become due from the said A. B., his executors or administrators, to the said C. D., his executors or administrators, with interest thereon after the rate aforesaid, from the time or respective times of the same respectively being advanced, lent, or paid, or becoming due:

Witnesseth, Covenant for payment of principal and interest.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for securing the re-payment of the said sum of £—— and other the sum and sums aforesaid with interest as aforesaid, he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, by these presents, that he the said A. B., his executors or administrators, shall and will, on the —— day of ——, pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, the sum of £——, with interest for the same at the rate of £5 for every £100 for the year, from the day of the date of these presents, without any deduction or abatement whatsoever, and shall and will at any time or from time to time, upon demand, pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, all and every other sum and sums of money which may at any time or times hereafter be lent, advanced, or paid by the said C. D., his executors or administrators, to or for the use or on the account of the said A. B., or which may at any time or times hereafter become due or owing to the said C. D., his executors or administrators, from or by the said A. B., his executors or administrators, with interest for the same sum or sums of money respectively, after the rate aforesaid, from the time or respective times of the same respectively being advanced, lent, or paid, or of the same respectively becoming due, as the case may be, without any deduction or abatement whatsoever:

Witnesseth, also assignment.

AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B. hath assigned, and by these presents doth assign unto the said C. D., his executors, administrators, and assigns,

—of policy.

ALL THAT the said policy of assurance hereinbefore particularly mentioned, and the full benefit

thereof, and all and every sum and sums of money to become due or payable, or to be had or received under or by virtue of the same, AND ALL the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said A. B., of, in, to, out of, or upon the said premises or any of them, or any part thereof, TOGETHER with full power and authority for the said C. D., his executors, administrators, or assigns, to ask, demand, sue for, recover, and receive, and give effectual receipts and discharges for the said sum or sums of money, or any part thereof, in the name or names of the said A. B., his executors or administrators (*b*), TO HAVE, HOLD, receive, and take the said policy of assurance, sum and sums of money, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns: UPON TRUST, that the said C. D., his executors, administrators, or assigns, do and shall enforce payment of all and singular the monies to become payable under or by virtue of the said policy as and when the same shall become payable, AND DO AND SHALL, in the first place, by and out of the same monies, reimburse himself or themselves, or pay and discharge or retain all the costs and expenses attending the obtaining payment of and receiving the said monies, or which shall be incurred in or about the execution of the trusts of these presents or in relation thereto; AND DO AND SHALL, in the next place, pay and apply such monies in or towards satisfaction of all and singular the monies which for the time being shall be due or owing on the security of these presents; AND DO AND SHALL pay the surplus, f any, of the said monies to become payable under or by virtue of the said policy unto the said A. B., his executors, administrators, or assigns, for his or

POLICY OF ASSURANCE.

Power of attorney.

Habendum.

(*b*) A much longer power of attorney is often used, but the short form in the text is quite as effectual. (See the longer form, ante, Vol. 2, p. 385; supra, p. 384; and see too, supra, p. 605, n. (*c*), as to the occasions on which powers of attorney ought to be employed).

POLICY OF ASSURANCE.

their proper use; AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, that he the said A. B. shall and will, during the continuance of this present security, from time to time, duly and punctually pay or cause to be paid the said annual premium of £——, and such other sum or sums of money (if any) as shall from time to time become payable, for keeping on foot the said policy of assurance, and shall and will make such payments at least ten days before the last day on which the same respectively must be paid, in order to keep the said policy on foot, and shall and will forthwith deliver the receipt for every such payment to the said C. D., his executors, administrators, or assigns; AND SHALL not nor will at any time hereafter do, commit, or suffer any act or thing whereby the said policy may be vitiated or become void or avoidable, or the said C. D., his executors, administrators, or assigns, may be prevented or hindered from recovering or receiving the money thereby intended to be assured, or any part thereof; AND THAT it shall be lawful for the said C. D., his executors, administrators, or assigns, in case the said A. B. shall neglect or refuse to make such payments as aforesaid, or any of them, at any time or times to pay the said annual premium of £——, and such other sum or sums of money (if any) as from time to time shall become payable, for keeping on foot the said policy of assurance; and in case the said policy shall at any time be vitiated or rendered void or voidable, then to effect a new policy or policies of assurance on the life of the said A. B., in any sum or sums not exceeding the sum of £——, and to pay all expenses of effecting such policy or policies, and the annual premium or premiums, or other sum or sums of money (if any) which shall from time to time become payable, for keeping on foot the same, (such new policy or policies, and the monies to become payable under or by virtue of the same respectively, to be held and applied upon and for the trusts, intents, and purposes hereinbefore declared of and concerning the said policy hereinbefore assigned, or expressed and intended so to be,

Covenant for payment of premiums.

—and not to vitiate policy.

—and that mortgagee may pay premiums and renew policy.

and the monies to become payable under or by virtue of the same): AND THAT the said A. B., his executors or administrators, shall and will from time to time, on demand, pay or cause to be paid unto the said C. D., his executors, administrators or assigns, all and every such sum and sums of money as shall have been paid or advanced by him or them in or towards payment of the said annual premium of £——, or any such other premium or premiums, sum or sums of money or expenses as aforesaid, with interest for the same after the rate of £—— per cent. per annum, from the time or respective times of the same having been advanced or paid (*c*): AND THAT in the meantime, and until such sum or sums of money shall be so paid with interest as aforesaid, all and singular the monies to become payable under or by virtue of the said policy of assurance hereinbefore mentioned to have been effected, or under or by virtue of the policy or policies to be effected in pursuance of the aforesaid covenant in that behalf, shall stand and be charged with the payment as well of such sum or sums of money, and the interest thereon, as of the said sum of £—— and interest, and other the principal monies and interest hereinbefore covenanted to be paid: AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, further covenant with the said C. D., his executors, administrators, and assigns, that he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to assign the said policy and premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, ad-

POLICY OF ASSURANCE.

—and that mortgagor will repay sums advanced by mortgagee.

—and that till repayment the same shall be a charge on the mortgaged premises.

Covenants for right to assign.

(*c*) All securities on policies of assurance should contain this clause. But it seems that if the mortgagee pay the premiums, he is entitled (even in the absence of a special agreement) to have them repaid with interest at £4 per cent., and that the mortgagor cannot redeem the policy until such repayment has been made. (*Hodgson* v. *Hodgson*, 2 Keen, 704). Such is the established doctrine with regard to any sums which mortgagees may pay for the renewal of leases, (supra, p. 563, n. (*f*)); and the same principle is evidently applicable to the premiums on policies of assurance. It is not, however, usual or proper to trust to general rules of courts of equity in matters of this description; and the subject is always made matter of special agreement.

Provision for repayment of premiums advanced by mortgagees.

POLICY OF ASSURANCE.

ministrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, free from all incumbrances: AND THAT he the said A. B., his executors and administrators, and all and every other person or persons whosoever having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim, any estate, right, title, or interest, of, in, or to the said policy of assurance and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will from time to time and at all times hereafter, until the whole of the principal monies and interest intended to be hereby secured shall have been paid, upon the request of the said C. D., his executors, administrators, or assigns, but at the costs and charges of the said A. B., his executors or administrators, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, and things, assignments and assurances in the law whatsoever, for enabling the said C. D., his executors, administrators, or assigns, to recover and receive all and every the sum and sums of money to become payable under or by virtue of the aforesaid policy or policies of assurance or any of them, and for the further, better, and more effectually assigning the said policy and premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said C. D., his executors, administrators, or assigns, for any sum or sums of money which may become payable under or by virtue of the said policy or policies of assurance or otherwise under or by virtue of these presents, or in the execution of the trusts hereof, shall be a sufficient and effectual discharge or sufficient and effectual discharges for the same respectively, or so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged

—and for further assurance.

Mortgagee's receipts to be good discharges.

to be received, and that the said assurance society, or the person or persons to whom the same shall be given, his, her, or their executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication or nonapplication, or be in anywise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received: AND IT IS HEREBY further agreed and declared that the said C. D., his executors, administrators, or assigns, or any of them, shall not be answerable or accountable for any involuntary losses which may happen in or about the execution of any of the trusts of these presents or in relation thereunto: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the total amount of the money hereby secured or to be ultimately recoverable hereupon, shall not exceed the sum of £—— (*d*). IN WITNESS, &c.

POLICY OF ASSURANCE.

—mortgagee not to be liable for involuntary losses.

Proviso as to amount to be ultimately recoverable.

LXVII.

COLLATERAL SECURITY *by* MORTGAGE *of a* POLICY *of* ASSURANCE *on the* LIFE *of the Mortgagor, and by a* FURTHER CHARGE *on the* LIFE-INTEREST *of the Mortgagor in certain Funds* (*a*).

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., and

Parties.

(*d*) As to this proviso, see supra, p. 523, n. (*l*).

(*a*) The usual reason for preparing collateral securities by separate deeds, is the desire to avoid mixing up two estates in one deed. In the case in the text, for example, the fee-simple estate, which forms the principal security, has a title clear and unincumbered; but if all the details connected with the collateral security were thrown into the principal deed, they would need a thorough examination on all subsequent investigations of title, in order to see that they did not prejudice or affect the title to the estate comprised in the principal deed. By the plan,

Propriety of preparing collateral securities by separate deeds.

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

E. F., of &c., [*mortgagees*], of the other part: [*Recitals showing that the mortgagee is entitled to a life-interest in the annual produce of certain funds, subject to divers charges already subsisting thereon, and as to the produce of one fund to an annuity to I. S. for his life*:] AND WHEREAS, by an indenture of appointment and release, bearing even date with, but executed before the execution of these presents, and grounded so far as the same operates as a release on a lease for a year, and made, or expressed to be made between the said A. B. of the first part, the said C. D. and E. F. of the second part, and G. H. of the third part, the said A. B., in consideration of the sum of £—— paid and advanced to him by the said C. D. and E. F. out of monies belonging to them on a joint account, and in exercise of the power to him the said A. B. for that purpose given by an indenture therein mentioned, hath directed, limited, and appointed, that the pieces or parcels of land and hereditaments thereinafter particularly mentioned, and intended to be thereby released, shall henceforth go, remain, and be to the use of the said C. D. and E. F., their heirs and assigns, subject to the proviso thereinafter contained, and hereinafter mentioned, for redemption of the said premises; AND by the said indenture now in recital, for the considerations aforesaid, the said A. B. hath granted, released, and confirmed unto the said C. D. and E. F., their heirs and assigns, divers pieces or parcels of land and hereditaments,

Narrative recitals.

Recital of the principal security.

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however, which is adopted in the text, the two estates are kept clear of each other's titles, and may at all future times be dealt with independently of each other. When the mortgage is paid off, of course separate reconveyances or releases must be prepared.

Precedent may be made useful for a primary security.

It is obvious that the form in the text may be very readily adapted to the case of a primary security on a life-interest and a policy of assurance, by adapting the recitals to such a deed, and adding a covenant for payment of the principal and interest. In that case it would be desirable to add a power of sale, although in the precedent in the text that was considered unnecessary on account of the prior incumbrancers having powers of sale, which it was apprehended would, under the circumstances, be available for the present mortgagee. Of course, the power of sale, if added, would be so framed as to include both the life-interest and the policy. The form given supra p. 606, will be very nearly in the required shape.

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

therein particularly mentioned, with the appurtenances, to hold the same unto and to the use of the said C. D. and E. F., their heirs and assigns, subject to the proviso thereinafter contained and hereinafter mèntioned for redemption of the said premises; AND in the said indenture now in recital is contained a proviso for redemption of the said premises upon payment by the said A. B., his heirs, executors, administrators, or assigns, unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, of the sum of £——, on the day therein mentioned for payment thereof, together with interest for the same after the rate of £— per cent. per annum, on the days and in manner therein appointed for payment thereof; AND in the said indenture now in recital is contained a covenant by the said A. B. with the said C. D. and E. F., their executors, administrators, and assigns, for payment of the said sum of £—— and interest: AND WHEREAS, upon the treaty for the advance of the said sum of £——, it was agreed that the repayment of the same with interest after the rate aforesaid, should be further secured by a policy of assurance for the sum of £——, to be effected on the life of the said A. B., in the names of the said C. D. and E. F., upon and for the trusts, intents, and purposes hereinafter declared and contained of and concerning the same, and that the said A. B. should enter into such covenants respecting the said policy of assurance as are hereinafter contained: AND WHEREAS, upon the treaty for the advance of the said sum of £——, it was also agreed that the repayment of the same, with interest after the rate aforesaid, should be further secured by such further charge as is hereinafter contained: AND WHEREAS, in pursuance of the said agreement in this behalf, the said A. B. has effected an assurance on his life for the sum of £——, by a policy of assuranee in the names of the said C. D. and E. F. (*b*), in the —— Assurance Office, bearing date the —— day of ——, numbered ——, and under the annual premium of £——: NOW THIS

—of agreement that loan should be further secured by a policy on the life of the borrower.

—and by further charge on his life interest.

—that policy has been effected.

(*b*) The policy, if effected for the occasion, should always be in the name of the mortgagee. (See supra, pp. 90, 91, and 367, n. (*a*).

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the said sum of £—— so paid and advanced to the said A. B. by the said C. D. and E. F. as aforesaid, it is hereby agreed and declared that the said C. D. and E. F., their executors, administrators, and assigns, shall stand possessed of and interested in the said policy of assurance, and all and singular the monies to become payable under or by virtue of the same, upon trust that they the said C. D. and E. F., and the survivor of them, and the executors or administrators of such survivor, their or his assigns, do and shall enforce payment of and receive all and singular the monies to become payable under or by virtue of the said policy as and when the same shall become payable, and do and shall in the first place by and out of the same monies reimburse themselves or himself, or pay or discharge all the costs and expenses attending the obtaining payment of and receiving the said monies, or which shall be incurred in or about the execution of the trusts of these presents or in relation thereto, and do and shall in the next place apply such monies in or towards satisfaction of all and singular the monies which for the time being shall be due or owing on the security of these presents, or of the said indenture of even date herewith, and do and shall pay the surplus, if any, of the said monies to be received under or by virtue of the said policy of assurance, unto the said A. B., his executors, administrators, or assigns, for his and their own use (*c*): AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements and for the considerations aforesaid, the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors, administrators, and assigns, that all and singular the interest, dividends, and annual proceeds to arise or accrue

Witnesseth, Declaration of trusts of the policy of assurance.

Witnesseth, Further charge on the life interest of the mortgagor.

(*c*) As to mortgages of policies of assurance, see supra, p. 610, n. (*a*), p. 615, n. (*c*). If a power of sale be added, the trusts declared of the monies to become payable under the policy should be included in those declared of the purchase-money at a sale in the manner pointed out in the note referred to.

due during the life of him the said A. B. from or in respect of the said sum of £——, [*a sum on mortgage*], and the said sum of £——, 3*l.* per cent. Consolidated Bank Annuities, and the said sum of £—— like annuities, or from or in respect of any stocks, funds, or securities, in or upon which the same sum of £——, or the monies arising from the sale of the said sums of 3*l.* per cent. Consolidated Bank Annuities, or either of them, or any part thereof respectively, may be invested, shall (but subject and without prejudice to the said hereinbefore recited securities, so far as the same respectively comprise or affect the said last-mentioned premises or any of them, and subject also, as to the dividends and annual produce of the said sum of £—— 3*l.* per cent. Consolidated Bank Annuities, or the stocks, funds, or securities in or upon which the monies arising from the sale thereof, or of any part thereof, may be invested, to the said annuity of £—— to the said I. S.) be and remain as a further security to the said C. D. and E. F., their executors, administrators, and assigns, for and be charged and chargeable with, the payment of the said sum of £——, and interest after the rate aforesaid, according to the proviso and covenant for payment thereof in the said indenture of even date herewith contained (*d*): AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors, administrators, and assigns, that he the said A. B. shall and will, during the continuance of this present security, from time to time duly and punctually pay, or cause to be paid, the said annual premium of £——, and such other sum or sums of money (if any) as from time to time shall become payable for keeping on foot the said policy of assurance, and shall and will make such payments at least ten days before the last day on which the

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

Covenants by mortgagor for payment of the premiums, &c., on the policy.

(*d*) As the interest on which the security is intended to be made, is merely equitable, a charge by way of covenant is quite as effectual as a formal assignment of the interest and a proviso for redemption. This would have been the case in the present instance, even if there had been no prior charges; but of course a legal life estate in land, or other property, must be dealt with in the ordinary way by actual conveyance, with a proviso for redemption.

Manner of charging equitable interests.

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

same respectively must be paid, in order to keep the said policy on foot, and shall and will forthwith deliver the receipt for every such payment to the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns: AND shall not nor will at any time hereafter do, commit, or suffer any act or thing whereby the said policy may be vitiated or become void or voidable, or the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, may be prevented or hindered from recovering or receiving the money thereby intended to be assured, or any part thereof: AND THAT it shall be lawful for the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, in case the said A. B. shall neglect or refuse to make such payments as aforesaid, or any of them, at any time or times to pay the said annual premium of £——, and such other sum or sums of money (if any) as from time to time shall become payable for keeping on foot the said policy of assurance; and in case the said policy shall at any time be vitiated or rendered void or voidable, then to effect a new policy or policies of assurance on the life of the said A. B. in any sum or sums not exceeding the sum of £——, and to pay all expenses of effecting such policy or policies, and the annual premium or premiums, or other sum or sums of money, (if any), which shall from time to time become payable for keeping on foot the same, (such new policy or policies, and the monies to become payable under or by virtue of the same respectively, to be held and applied upon and for the trusts, intents, and purposes hereinbefore declared of and concerning the said policy hereinbefore mentioned to have been effected, and the monies to become payable under or by virtue of the same): AND THAT the said A. B., his executors or administrators, shall and will from time to time, on demand, pay or cause to be paid unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, all and every such sum and sums of money as shall have been paid or advanced by them or him in or towards payment of the said annual premium of

—and to do nothing to vitiate the policy.

—and that on neglect by mortgagor mortgagees may pay premiums, &c.

—and effect new policies if need be.

—and that mortgagor will repay mortgagee all advances and expenses with interest.

£——, or any such other premium or premiums, sum or sums of money, or expenses as aforesaid, with interest for the same after the rate of £— per cent. per annum, from the time or respective times of the same having been advanced or paid: AND THAT in the meantime, and until such sum or sums of money shall be so paid with interest as aforesaid, all and singular the monies to become payable under or by virtue of the said policy of assurance hereinbefore mentioned to have been effected, or under or by virtue of the policy or policies to be effected in pursuance of the aforesaid covenant in that behalf, and all and singular the premises hereinbefore charged, or expressed and intended so to be, shall stand and be charged with the payment as well of such sum or sums of money and the interest thereof, as of the said sum of £—— and interest (*e*): AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, further covenant with the said C. D. and E. F., their executors, administrators, and assigns, that he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to charge the premises hereinbefore charged, or expressed and intended so to be, in manner aforesaid, according to the true intent and meaning of these presents: AND THAT he the said A. B., his executors and administrators, and all and every other person or persons whosoever having or lawfully

COLLATERAL SECURITY ON POLICY OF LIFE ASSURANCE AND LIFE-INTEREST.

—and that till payment the same shall be a charge on the mortgaged premises.

Covenants by mortgagor for right to charge.

—and for further assurance.

(*e*) In securities of this nature, the policy of assurance may be comprised either in the principal or the collateral deed. The advantage of its being comprised in the collateral deed is, that when the principal estate is sold, the mortgage-deed can be given up to the purchaser without inconvenience as regards any further dealings with the policy. In the case of the precedent in the text it was intended that the principal estate should be forthwith sold, and that the residue subsequently remaining unpaid of the debt should continue to rest on the collateral security. It was, therefore, obviously desirable, that the policy of assurance should be kept separate from the estate to be sold. But there are disadvantages connected with this arrangement, for a higher stamp-duty must be paid on the amount fixed as a security for the premiums, if it be a separate sum in a separate deed, than if it merely form an addition to the principal sum, and for this amount the mortgagee merely gets the collateral, and not both the principal and collateral security. Hence, it is more usual to include the policy in the principal deed.

Whether the policy should be comprised in the principal or collateral deed.

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

or equitably claiming, or who shall or may have or lawfully or equitably claim, any estate, right, title, or interest, of, in, or to the said policy of assurance, sums of money, and premises, the trusts whereof are hereinbefore declared, or any of them, or any part or parts thereof, or of, in, or to the said premises hereinbefore charged, or expressed and intended so to be, as aforesaid, shall and will from time to time and at all times hereafter, until the whole of the principal monies and interest, intended to be hereby secured, shall have been repaid, upon the request of the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, but at the costs and charges of the said A. B., his executors or administrators, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, and things, assignments and assurances in the law whatsoever, for enabling the said C. D. and E. F., and the survivor of them, and the executors and administrators of such survivor, their or his assigns, to recover and receive all and every the sum and sums of money to become payable under or by virtue of the aforesaid policy or policies of assurance, or any of them, and for the further, better, and more effectually charging the said premises hereinbefore charged, or expressed and intended so to be, subject as hereinbefore is mentioned, and according to the true intent and meaning of these presents, as by the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, or their or his counsel in the law, shall be reasonably devised or advised and required. [*Power to C. D. and E. F., and the survivor of them, and the executors or administrators of such survivor, their or his assigns, to give effectual receipts, supra, p.* 616]: AND IT IS HEREBY further agreed and declared, that the said C. D. and E. F., or either of them, their or either of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the execution of any of the trusts of these presents, or in relation thereunto: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these

Mortgagee's receipt clause.

Indemnity clause.

Limitation of the ultimate

presents, that the total amount of the money hereby secured or to be ultimately recoverable thereupon, over and above the said sum of £—— and interest, in respect of which a stamp of £—— has been affixed to the said indenture of even date herewith, shall not exceed the sum of £—— (*f*). IN WITNESS &c.

COLLATERAL SECURITY ON POLICY OF LIFE-ASSURANCE AND LIFE-INTEREST.

amount to be secured.

—◆—

LXVIII.

COLLATERAL SECURITY (*a*), *by a* CHARGE *on the* EQUITY OF REDEMPTION, *of a Fee-simple Estate and of a Life Estate, and of other Premises.* COVENANT *by the* MORTGAGOR (*if required*) *to effect and keep on foot an* ASSURANCE *on his* LIFE.

COLLATERAL SECURITY—COVENANT TO INSURE LIFE.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*mortgagor*], of the one part; and C. D., of &c., [*mortgagee*], of the other part: [*Recites that* "A. B. is seised or entitled (subject to the mortgages thereof hereinafter mentioned) of or to the piece of land and hereditaments firstly hereinafter particularly mentioned, and intended to be hereby charged, for an estate of inheritance in fee-simple;" [*Recitals, shewing that A. B. is entitled for his life, and for an ultimate estate in fee, to an equity of redemption of* "the manor, messuages, farms, and lands secondly hereinafter particularly mentioned and intended to be hereby charged,"—*recital of several charges and mortgages upon the estate of A. B. in all these premises, and upon several policies of assurance on his life, the mortgagees having powers of sale;—recital of the principal security, bearing even date, supra, p.* 618]: AND WHEREAS, upon the treaty for the advance of the said sum of £——, it was

Parties.

Narrative recitals.

Recital of agreement for collateral security.

(*f*) As to this proviso, see supra, p. 523, n. (*l*).

(*a*) See the observations on collateral securities, supra, p. 617, n. (*a*).

COLLATERAL SECURITY—COVENANT TO INSURE LIFE.

agreed, that the repayment thereof, with interest after the rate aforesaid, should be secured by such further charge as is hereinafter contained; and that the said A. B. should enter into such covenant as is hereinafter contained for effecting and keeping on foot a policy or policies of assurance on the life of him the said A. B., in the name or names of the said C. D., his executors, administrators, or assigns, and such other covenants in relation to such policy or policies as are hereinafter contained, and that the said policy or policies, and the monies to be thereby assured, should be held and applied upon and for the trusts, intents, and purposes hereinafter declared and contained of and concerning the same: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement in this behalf, and for the considerations aforesaid, the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that ALL THAT, &c., [*first parcels*], (being the piece of land hereinbefore referred to as the hereditaments firstly hereinafter particularly mentioned), together with the easements, rights, and appurtenances thereunto belonging, AND ALSO ALL the estate and interest whatsoever of him the said A. B., of and in the manor, &c., [*second parcels*], (all which said manor, messuages, farm, and lands are the hereditaments hereinbefore referred to as the hereditaments secondly hereinafter particularly mentioned, and a rental or particular of all which said last-mentioned premises is annexed by way of schedule to these presents), and also of and in their rights, easements, and appurtenances, AND ALSO ALL and singular the policies of assurance on the life of him the said A. B., mentioned in the said several indentures of the —— day of ——, &c., [*enumerating the recited securities*], and the monies to become payable under or by virtue of the same respectively, AND ALSO ALL and singular other the premises (if any) in the said indentures, or any of them, mentioned and comprised, and the monies to arise from any sale or sales to be effected under any of the powers of sale in the said indentures respectively contained, or otherwise howsoever, of the said premises or any of them, shall (but subject and

Witnesseth, Covenant

—that parcels and property described,

without prejudice to the said hereinbefore recited securities, so far as the same respectively comprise or affect the said premises or any of them, be and remain as a further security to the said C. D., his executors, administrators, and assigns, for, and be charged and chargeable with, the repayment of the said sum of £1,500, and interest after the rate aforesaid, according to the proviso and covenant for payment thereof in the said indenture of even date herewith contained (*b*): AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement in this behalf, and for the considerations aforesaid, he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B. shall and will, at his own costs, at any time or times during the continuance of the security intended to be hereby made, upon the request of the said C. D., his executors, administrators, or assigns, effect a policy or policies of

COLLATERAL SECURITY—COVENANT TO INSURE LIFE.

—shall, subject to the existing securities, be a collateral security for the mortgage-debt.

Witnesseth, further covenant by the mortgagor when required to insure his life.

(*b*) It is usual to effect a mortgage upon an equity of redemption, by conveyance, with a proviso for redemption, as in the case of a legal mortgage. This custom is owing partly to abundant caution, apprehensive that the legal estate may perchance not have passed by the prior mortgage, and partly to the convenience of dealing with the security in its accustomed shape. If, for instance, there is to be a power of sale in the second mortgage, it is more convenient, perhaps, to have the proviso for redemption to refer to, although it would seem that a reference to the covenant which there must be for the payment of money would be quite as effective. But when (as in the case in the text) there are several prior mortgages, so that there cannot be the slightest doubt of the legal estate having passed by some of them, and no power of sale is required, all that is required is an equitable security; and such a security may be well and effectually made by means of a covenant in the shape of that in the text. It should be understood, too, that although this method is not very common, it may be safely used in any mortgage of an equity of redemption, and its simplicity and conciseness are evidently strong recommendations of its more frequent use. Of course, if the charge be intended as a primary security, a covenant must be added for payment of the mortgage-money and interest. In the precedent in the text, and in the last precedent, covenants are added for a right to charge and for further assurance, but they are not of much use and may be omitted if conciseness is required. The observation with regard to notice, supra, p. 597, n. (*a*), must be borne in mind.

Mortgage of an equity of redemption.

COLLATERAL SECURITY—COVENANT TO INSURE LIFE.

assurance in the name or names of the said C. D., his executors, administrators, or assigns, in any sum or sums not exceeding in the whole the sum of £——, and on the life of him the said A. B., in any office or offices which the said C. D., his executors, administrators, or assigns, shall select, and shall and will, at the like costs of him the said A. B., make all such appearances and answers, and procure all such certificates and other documents, and do all such other acts and things as shall be necessary or expedient for effectuating such policy or policies; AND SHALL AND WILL, during the continuance of this present security, from time to time, duly and punctually pay or cause to be paid all such annual premium or premiums, and other sum or sums of money (if any), as shall from time to time become payable for keeping on foot the said policy or policies of assurance so to be effected on the life of the said A. B., as and when such premium and premiums, sum and sums of money, shall become payable, and shall and will make such payments at least ten days before the last day on which the same respectively must be paid, in order to keep the said policy or policies on foot, and shall and will forthwith deliver the receipt for every such payment to the said C. D., his executors, administrators, or assigns, and shall not nor will at any time, during the continuance of the security intended to be hereby made, do, commit, or suffer any act or thing whereby it may happen that the said policy or policies cannot be effected, or whereby the same, having been effected, may be vitiated or become void or voidable, or the said C. D., his executors, administrators, or assigns, may be prevented or hindered from recovering or receiving the money intended to be thereby respectively assured, or any part thereof; AND SHALL AND WILL, from time to time and at all times hereafter during the continuance of the security intended to be hereby made, upon the request of the said C. D., his executors, administrators, or assigns, but at the cost of the said A. B., his executors or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other acts, deeds, matters, and things whatsoever, for enabling the said C. D., his executors, administrators, and assigns, to obtain

—and to keep on foot the policies effected.

—and do all necessary acts for enabling the mortgagee to receive payment of the money.

payment of and receive the monies to be assured by the said policy or policies of assurance, or any of them, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required; AND FURTHER, THAT, if the said C. D., his executors, administrators, or assigns, shall at any time or times hereafter advance or pay, or cause to be advanced or paid, any sum or sums of money, for effecting the said policy or policies of assurance or any of them, or in or towards the payment of the said annual premiums, or any such other sum or sums of money for keeping the said policy or policies of assurance or any of them on foot as aforesaid, then and in such case, and whenever the same shall happen, he the said A. B., his executors, administrators, or assigns, shall and will, from time to time, on demand, pay or cause to be paid to the said C. D., his executors, administrators, or assigns, all and every such sum and sums so to be advanced or paid as last aforesaid, with interest for the same respectively after the rate aforesaid from the time or respective times of the same having been advanced or paid; AND THAT in the meantime, and until such sum or sums of money shall be so paid, with interest as aforesaid, all and singular the premises hereinbefore charged, or expressed and intended so to be, and the said policy or policies of assurance to be effected in pursuance of the aforesaid covenant in that behalf, and all and singular the monies to become payable under or by virtue of the same policies or any of them, shall stand and be charged with the payment as well of such sum or sums of money, and the interest thereon, as of the said sum of £—— and interest (*c*). [*Declaration of trusts of policies and of the money assured, supra, p.* 620. *Covenants by A. B. with C. D., his executors, administrators, and assigns, for right to charge—and for further*

COLLATERAL SECURITY—COVENANT TO INSURE LIFE.

—and to repay any advances made by the mortgagee.

—and that, till repayment, such advances shall be a charge on the mortgaged premises.

Miscellaneous clauses and covenants.

(*c*) With respect to the advantages and disadvantages of including the policy of assurance in the collateral security, see supra, p. 623, n. (*e*). Some remarks on the object and utility of the covenants relating to policies of assurance will be found, supra, p. 610, n. (*a*), and p. 615, n. (*c*).

COLLATERAL SECURITY—COVENANT TO INSURE LIFE.

assurance, supra, p. 623, — *mortgagee's receipt clause, supra, p.* 616, — *indemnity clause and limitation of the amount to be secured, supra, pp.* 617 *and* 624]. IN WITNESS &c.

THE SCHEDULE to which the above-written indenture refers.

LXIX.

ATTENDANT TERM IN TRUST FOR MORTGAGEES.

ASSIGNMENT *of an* ATTENDANT TERM *in Trust for a* MORTGAGEE, *and to attend the Inheritance.*

Parties. THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*assignor*], of the first part; C. D., of &c., [*mortgagor*], of the second part; E. F., of &c., [*mortgagee*], of the third part; and G. H., of &c., [*mortgagee's trustee*], of the fourth part:

Recitals. [*Recitals of the creation of the term and of the subsequent devolution of the freehold and the term in the same manner as on the assignment in trust for a purchaser, supra, Precedents LI. and LII., recital of the mortgage deed, see infra, Precedent LXX., and of the desire of the mortgagee that the term should be assigned, see supra, p.* 456]: NOW THIS INDENTURE WITNESSETH, &c. [*assignment of the term, see supra, pp.* 456 *and* 461],

Habendum. TO HAVE AND TO HOLD the said —— and hereditaments, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said G. H., his executors, administrators, and assigns,

In trust. IN TRUST for the said E. F., his heirs and assigns, and to assign and dispose of the same as he or they shall from time to time direct or appoint, and in the meantime upon trust to permit the residue of the said term of —— years to wait upon and attend the freehold and inheritance of the premises therein comprised, and to protect the same from all mesne incumbrances, if any such there be, but subject as to the said term of years to the

same right, title, and equity of redemption as the freehold and inheritance of the same hereditaments and premises now are, or hereafter shall or may be subject or liable to, under or by virtue of the proviso hereinbefore contained for redemption of the same premises. [*Covenant by A. B. with G. H., his executors, administrators, and assigns, against incumbrances, supra, p.* 458]. IN WITNESS &c. (*a*).

ATTENDANT TERM IN TRUST FOR MORTGAGEES.

Covenant.

LXX.

APPOINTMENT *of a* RECEIVER (*a*).

APPOINTMENT OF RECEIVER.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagor*], of the first part; C. D., of &c., [*mortgagee*],

Parties.

(*a*) The method of preparing assignments of terms is pointed out in the notes to the foregoing Precedents LI., and LII. Assignments of terms in trust for mortgagees are prepared in precisely the same way as those in trust for purchasers, with the exception of the declaration of the trusts. It has not, therefore, been deemed necessary to give at length any precedents of assignments of terms in trust for mortgagees; they will be easily prepared from the precedents referred to.

(*a*) After default has been made in payment of the principal money or interest, or immediately after the execution of the mortgage, if there be no proviso for quiet enjoyment by the mortgagor until default, the mortgagee may enter into possession of the land, or, by giving notice to the tenants, into the receipt of the rents and profits. (See supra, p. 492, n.) The mortgagee may charge the actual expenses incurred by him, but he cannot stipulate for an allowance or commission to himself for the trouble of collecting the rents; (*French* v. *Baron*, 2 Atk. 120; *Scott* v. *Brest*, 2 Term. Rep. 238; *Chambers* v. *Goldwin*, 9 Ves. 271); nor can he on any pretext charge for his trouble in collecting the rents. (*Godfrey* v. *Watson*, 3 Atk. 518; *Langstaff* v. *Fenwick*, 10 Ves. 405; *Carew* v. *Johnston*, 2 Scho. & Lef. 301; *Lord Trimleston* v. *Hamill*, 1 Ball & Beaty, 377). The only exception to the above rule is in the case of a mortgagee (not in possession) of a West India estate. (*Bunbury* v. *Winter*, 1 Jac. & Walk. 255; *Leith* v. *Irvine*, 1 My. & Ke. 277; and the cases there cited. But although the mortgagee is precluded from charging for his own trouble in collecting, he is not obliged in all cases to take

Mortgagee cannot charge for trouble in collecting rents.

—but may appoint a receiver with allowance.

APPOINTMENT OF RECEIVER.

Recital of mortgage.

of the second part; and E. F., of &c., [*receiver*], of the third part: WHEREAS, by an indenture of release bearing

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that trouble; he may of his own authority appoint a receiver whenever the distance or the nature of the property is such as would require much time or trouble for the collection of the rents, and may allow and charge a reasonable remuneration for the services of such receiver. (*Bonithon* v. *Hockmore*, 1 Vern. 316; *Davis* v. *Dendy*, 3 Madd. 170; and see the cases above cited). The remuneration allowed is generally £5 per cent. on the amount of rents collected; it may of course be less, but unless in very extraordinary cases it should not exceed that rate. (*Davis* v. *Dendy*, ubi supra).

Mortgagee not having the legal estate may have a receiver appointed by a court of equity.

The preceding remarks apply to the case of a legal mortgagee who has his remedy in his own hands, and neither requires nor can have the assistance of a court of equity in appointing a receiver. (*Berney* v. *Sewell*, 1 Jac. & Walk. 647). But a mortgagee of an equity of redemption, or an equitable mortgagee, cannot of his own authority enter into possession or appoint a receiver, and therefore, unless a prior mortgagee be in possession, he may have a receiver appointed by a court of equity; but such application must be without prejudice to the prior mortgagee (if any) taking possession. (*Berney* v. *Sewell*, 1 Jac. & Walk. 647; and the cases cited in the note thereto, pp. 649, 650; *Aberdeen* v. *Chitty*, 3 You. & Col. 379). And it is said, that if a receiver appointed by the court misapply the rents and profits, the loss must fall on the mortgagor. (*Rigge* v. *Bowater*, 3 Bro. C. C. 365). Receivers appointed by the court are of course subject to the regulations and orders of the court, and their duties and liabilities are defined in the works relating to equity.

Mortgagee may stipulate for the appointment of a receiver.

But, as has been previously observed, the mortgagee may stipulate for the appointment of a receiver, to be made either by the mortgage or by a separate deed. The advantage of making the appointment by a separate deed is, that such deed can be conveniently placed in the hands of the receiver, and be exhibited as an authority to the tenants for the payment of their rents to him. But if, as is usually the case, the receiver appointed is the mortgagee's solicitor, in whose hands the mortgage-deed will remain, there is little objection to appointing the receiver by the mortgage deed, and thus saving the expense of a separate deed. (See the precedent of such an appointment, infra, Precedent LXXIV.) A receiver is usually appointed by a deed in the shape of a power of attorney, as in the case in the text. Some practitioners make the mortgagor and mortgagee demise the lands to the receiver for a term of years, so as to give him the legal estate. This will enable him to distrain in his own name upon the tenants, and will prevent the determination of his authority by the death of the persons appointing him. But if the appointment be made by power of attorney, the distress may be made in the name of the owner of the legal estate; (*Pitt* v. *Snowden*, 3 Atk. 750;

even date with these presents, grounded on a lease for a year, and made or expressed to be made between [*parties*], in consideration of the sum of £—— paid to the said A. B. by the said C. D., the said A. B. did grant and release unto the said C. D. and his heirs all that messuage or tenement, farm, lands, and hereditaments therein particularly described, (a rental or particular of which said messuage, farm, lands, and hereditaments is contained in the schedule hereunder written or hereunto annexed), with the appurte-

APPOINTMENT OF RECEIVER.

Hughes v. *Hughes*, 3 Bro. C. C. 87); and it is easy to remedy any mischance which may happen from the death of the parties appointing, by making a new appointment in the manner provided by the deed. The inconvenience of vesting the legal estate in a mere receiver is so great, that the practice should never be followed.

Convenience of appointing a receiver at the time of the mortgage.

If the estate mortgaged be of such a nature, that the collection of the rents will be troublesome or expensive, the appointment of a receiver should always be made a part of the arrangement. For although, as above stated, the mortgagee can of his own authority in certain cases appoint a receiver, yet it will always leave open the questions, whether the case justified the appointment, and whether the salary allowed was reasonable. The mortgagee, too, is of course liable for any act or defalcation of a receiver appointed by himself, while the mortgagor is always made responsible for a receiver appointed at the date of the mortgage. And if the receiver be appointed by a deed to which both mortgagor and mortgagee are parties, his powers, duties, and liabilities can be clearly laid down. There does not appear to be any hardship or inconvenience to the mortgagor in having a receiver appointed, because the deed may always contain a stipulation that the receiver shall not act unless the interest be in arrear.

Powers, duties, and liabilities of a receiver appointed by deed.

The powers, duties, and liabilities of a receiver should always be accurately defined by the deed appointing him, for he takes them entirely from the deed, and the books supply very few instances of decisions on the nature of his situation. In a recent case, the receiver was appointed by both mortgagor and mortgagee, and was authorized to bring actions in case of nonpayment of the rents, to give notices to quit, and, in cases of noncompliance, to bring ejectment, to grant leases, and to do all other matters concerning the said premises, as fully and effectually to all intents and purposes as the mortgagor could have done; and it was held, that the receiver had authority to demand possession from tenants under the statute 4 Geo. 2, c. 28, s. 1, so as to make them liable in double value for holding over. (*Poole* v. *Warren*, 3 Nev. & Per. 693).

It is apprehended, that, under the power in the text, the receiver would not have such authority, and that it is not intended he should have power to eject tenants of his own authority.

APPOINTMENT OF RECEIVER.

nances, to hold the same unto and to the use of the said C. D., his heirs and assigns, subject to the proviso in the said indenture now in recital contained for redemption of the said premises, on payment by the said A. B., his heirs, executors, administrators, and assigns, to the said C. D., his executors, administrators, or assigns, of the sum of £—— on the —— day of ——, with interest for the same, at the rate of £—— per cent. per annum, by equal half-yearly payments, on the —— day of —— and the —— day of ——; and by the said indenture now in recital the said A. B., for himself, his heirs, executors, and administrators, covenanted with the said C. D., his executors and administrators (among other things), that, in case the said sum of £—— should not be paid on the said —— day of ——, he the said A. B., his heirs, executors, administrators, or assigns, would pay or cause to be paid to the said C. D., his executors, administrators, or assigns, interest for the said sum of £——, or for so much thereof as should for the time being remain unpaid, at the rate of £—— per cent. per annum, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year: AND WHEREAS, upon the treaty for the said mortgage, it was agreed, that, for securing the punctual and regular payment of the interest of the said sum of £——, the said E. F. should be appointed receiver, with the powers and in manner hereinafter mentioned, of the rents and profits of the said messuage, farm, lands, and hereditaments mentioned in the said schedule hereunder written or hereunto annexed, and that these presents should contain such covenants, clauses, and provisions as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, he the said A. B. (with the privity of the said C. D., testified by his being a party to and executing these presents) (*b*) hath nominated, constituted, and ap-

—of agreement for the appointment of the receiver.

Witnesseth.

Appointment of the receiver.

As to mortgagee not joining in the appointment of the receiver.

(*b*) The mortgagee is sometimes made to join in the appointment, as having taken the legal estate by the mortgage, and perhaps it would be more proper that he should do so. But usually the mortgagor alone appoints with the privity of the mortgagee, as in the precedent in the

pointed, and by these presents doth nominate, constitute, and appoint the said E. F. sole receiver, agent, and attorney, from time to time, in the name of the said A. B., to ask, demand, collect, and receive all and every the rents and profits of the said messuage, farm, lands, and hereditaments mentioned in the said schedule to these presents, from the present and future tenants and occupiers thereof, and the person and persons liable to pay the same respectively, as and when the same shall from time to time become due and payable, and in case of the non-payment thereof to take and use such lawful remedies for recovering and obtaining payment of the said rents and profits, or any part thereof, by action, suit, distress, or otherwise, as shall be thought necessary, and further to do, perform, and execute all other matters and things needful and requisite for collecting and receiving the said rents and profits, as fully and effectually to all intents and purposes as the said A. B. could or might do (*c*): AND the said A. B. doth hereby order and direct all and every the tenants and occupiers of all the said premises respectively, to pay unto the said E. F. all and singular the rents and profits of the said premises, for the purposes hereinafter mentioned; AND doth hereby declare that the receipts of the said E. F. shall be good and sufficient discharges to such tenants or occupiers and persons for such rents and profits as they shall respectively

APPOINTMENT OF RECEIVER.

Directions that rents shall be paid to receiver.

—whose receipts are to be discharges.

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text. Certainly, at the date of the mortgage, the mortgagor retains the immediate legal estate for a term under the proviso for quiet enjoyment until default; (supra, p. 474, n. (*n*)); but that does not seem to be a sufficient reason for the mortgagee not joining in the appointment. Perhaps, the origin of the practice may have been, that the receiver being appointed for the mortgagee's benefit, and being usually his solicitor or agent, when the appointment has been made by the mortgagor, the mortgagee can at any time confer such powers as must proceed from himself.

(*c*) It is not usual to extend the powers of a receiver by deed beyond those required for collecting the rents and profits. If it be intended that he should have powers to eject tenants, grant leases, or the like, such powers should be specially given. (See *Poole* v. *Warren*, 3 Nev. & Per. 693, and supra, note (*a*).) But it is apprehended, that if a lessee accept a lease from a receiver, whether he has or has not authority to grant it, the lessee cannot dispute its validity. (*Dancer* v. *Hastings*, 4 Bing. 2).

Powers of receiver confined to collecting rents and profits.

APPOINTMENT OF RECEIVER.

Declaration of trusts of the rents and profits.

pay to him: AND IT IS HEREBY agreed and declared between and by the said parties to these presents, that all and every the rents and profits which shall be received by the said E. F. shall be held by him upon and for the trusts, intents, and purposes hereinafter mentioned; (that is to say), upon trust that he the said E. F. shall and do by

—to pay outgoings.

and out of the same from time to time, IN THE FIRST PLACE, pay all taxes, rates, assessments, and impositions whatsoever now or hereafter to be taxed, charged, assessed, or imposed upon or in respect of the said premises, and which the respective tenants or occupiers thereof shall not

—and retain a per-centage as salary.

be liable to pay (*d*); AND IN THE NEXT PLACE deduct and retain for his own use so much and such sums of money, not exceeding after the rate of £5 for every £100, as he shall reasonably deserve as a compensation and satisfaction for his cares, pains, troubles, and expenses in recovering and paying the said rents and profits in manner and for the

—and pay interest on mortgage.

purposes herein mentioned: AND, IN THE NEXT PLACE, pay to the said C. D., his executors, administrators, and assigns, by two equal half-yearly payments, on the —— day of ——, and the —— day of —— in every year, interest for the said sum of £——, or for so much thereof as for the

—and pay surplus to mortgagor.

time being shall remain unpaid: AND, IN THE LAST PLACE, pay the clear residue and surplus which shall remain of the said rents and profits, after answering the several purposes aforesaid unto the said A. B., his executors,

Covenant by the receiver for the discharge of his duties.

administrators, and assigns; AND THE SAID E. F. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, and also with the said A. B., his heirs and assigns, in manner following: (that is to say), that he the said E. F. shall and will from time to time, so long as he shall be the collector or receiver of the rents and profits of the said premises, use his utmost endeavours to collect and

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Power for the receiver to repair and insure.

(*d*) It may frequently be expedient to provide, that the receiver shall pay such sums as shall be necessary for keeping the premises properly repaired and adequately insured against loss by fire. As to the power of a receiver appointed by the Court of Chancery, to expend money in repairs, see *Attorney-General* v. *Vigors*, 11 Ves. 563; *Waters* v. *Taylor*, 15 Ves. 26.

receive the same, and shall and will from time to time and at all times truly and punctually pay or cause to be paid, in manner and to and for the ends, intents, and purposes aforesaid, all such monies as shall from time to time be collected or received by him the said E. F, by virtue of or under the aforesaid powers or authorities: AND THE SAID A. B. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said C. D., his executors, administrators, and assigns, in manner following; (that is to say), that he the said A. B. shall not nor will, without the consent of the said E. F., his executors, administrators, or assigns, first had and obtained in writing, under his or their hand or hands, revoke(*e*) the powers or authorities hereby given to the said E. F., or any of them, or do or suffer to be done any act, matter, or thing, whereby the said powers or authorities hereby given, or any of them, may or shall become void or of no effect, or hinder or obstruct him the said E. F., or any future receiver to be appointed as hereinafter is mentioned, in recovering, collecting, or receiving all or any of the rents and profits of the said premises upon and for the trusts, intents, and purposes aforesaid, during such time as the said sum of £——, or any part thereof, shall remain on the security of the said premises, or any of them: AND FURTHER, THAT, in case the said E. F. shall die, or by any disability be disqualified or rendered incapable to collect or receive the said rents and profits, or shall refuse or neglect to proceed therein in manner aforesaid, or shall otherwise misbehave himself in the trusts hereby in him reposed, whilst the said sum of £——, or any interest for the same, or any part thereof respectively shall remain and continue on the aforesaid security, then and in any of the said cases, except the death of the said E. F., he the said A. B., his heirs or assigns, shall and will join with the said C. D., his executors, administrators, or assigns, in removing the said

APPOINTMENT OF RECEIVER.

Covenants by mortgagor.

—not to obstruct receiver.

—and to remove him and appoint a new one if required.

(*e*) A power of attorney executed for a valuable consideration cannot be revoked without the consent of the person for whose benefit it was granted. (*Odes* v. *Woodward*, 2 Ld. Raym. 849; *Walsh* v. *Whitcomb*, 2 Esp. 565; *Bromley* v. *Holland*, 7 Ves. 28; and see supra, p. 384, n. (*f*)). But the covenant in the text is usually inserted.

Power of attorney for valuable consideration not revocable.

APPOINTMENT OF RECEIVER.

E. F. from the said employment, and shall and will in any of the said cases duly constitute, appoint, and authorize such other fit person or persons in the place or stead of the said E. F., as the said C. D., his executors, administrators, and assigns shall from time to time nominate, to collect, receive, and pay the said rents and profits of the said premises upon and for the trusts, intents, and purposes hereinafter mentioned, and so from time to time when and so often as the like case shall happen, until the said sum of £——, and all interest for the same, shall be paid to the said C. D.; AND THAT in case the said A. B., his heirs or assigns, shall refuse or neglect so to do for the space of three calendar months next after the death, incapability, or misbehaviour of him the said E. F., or any other receiver so to be constituted as aforesaid, then and in such case, and so from time to time as often as the like case shall happen, it shall be lawful for the said C. D., his executors, administrators, and assigns, if they shall think fit, without the consent or concurrence of the said A. B., his heirs or assigns, to constitute or appoint some fit person to collect, receive, and pay the said rents and profits upon the trusts and for the intents and purposes aforesaid, with such reasonable salary for his care, pains, trouble, and expenses as the said C. D. shall think fit, not exceeding £5 for every £100 to be received: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said C. D., his executors, administrators, and assigns, shall not in anywise be charged with, or answerable for, any loss, misapplication, or non-application of the rents and profits of the said premises, or any part thereof, by reason of any default, neglect, or breach of trust of or in the said E. F., or any future collector or receiver to be appointed as aforesaid, but that such loss, misapplication, or non-application, and every receiver's salary, shall be wholly borne and paid by the said A.B., his heirs, executors, or administrators (*f*): PROVIDED ALWAYS, and it is hereby lastly agreed and declared between and by the parties to these presents, that the said

—and that on neglect by mortgagor, mortgagee may appoint a new receiver.

Mortgagee not to be liable for acts of receiver.

Receiver not to act till after default in payment of interest.

Mortgagee not to be liable for

(*f*) If this clause were not contained in the deed, there might be some doubt whether the mortgagee would not be liable for the receiver's

E. F. or other the receiver or receivers so to be appointed as hereinbefore is mentioned, shall not act or assist in the execution of the trusts and powers hereinbefore contained, unless and until some half-yearly payment of interest on the said sum of £——, or some part thereof, shall be in arrear and unpaid for the space of one calendar month (*g*). IN WITNESS &c.

APPOINTMENT OF RECEIVER.

THE SCHEDULE referred to in the above-written Indenture.

LXXI.

DEED *of* FURTHER CHARGE.

FURTHER CHARGE.

THIS INDENTURE, made &c., BETWEEN the within-named (*a*) A. B., [*mortgagor*], of the one part, and the within-

Parties.

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defalcation or misapplication. Thus, where a trustee for the benefit of creditors became bankrupt, having retained a sum of money belonging to the trust for three years unapplied, it was held, that the creditors and not the debtor should bear the loss. (*Hutchinson* v. *Lord Massarene*, 2 Ball & Beatt. 49).

receiver's defaults.

Sometimes it is provided, that the receiver shall not be liable for involuntary losses; (see the form, supra, p. 617); but it is considered, that, even in the absence of stipulation, a receiver will not be liable for losses which may occur in the proper discharge of his duty. (*Knight* v. *Lord Plymouth*, 3 Atk. 480; *S. C.* 1 Dick. 120). Of course, however, he will be liable for losses which may occur by means of his own conduct. (*Wren* v. *Kirton*, 11 Ves. 377; *Salway* v. *Salway*, 2 Russ. & My. 215. See, too, the cases of *Macdonnell* v. *Harding*, 7 Sim. 178; *Clough* v. *Dixon*, 8 Sim. 594).

Liability of receiver for involuntary losses.

(*g*) This proviso will of course be omitted if it be intended that the receiver shall forthwith enter into the possession of the rents and profits. But the usual practice is to postpone his entering on his office till default has been made in payment of interest. (See supra, n. (*a*)).

(*a*) The precedent in the text is that of a draft intended to be indorsed on the mortgage deed, and, if circumstances will permit, deeds of further charge should always be so indorsed, in order to avoid the necessity of reciting the mortgage-deed. It sometimes, however, happens, that from the situation of the mortgagor's abode, to which the deed must be sent

Manner of preparing further charges.

FURTHER CHARGE.

named C. D. and E. F., [*mortgagees*], of the other part: WHEREAS the within-mentioned sum of £2,000 remains due and owing to the said C. D. and E. F. by the said A. B. upon the security of the within-written indenture, but all interest for the same has been paid up to the —— day of —— past; AND WHEREAS the said C. D. and E. F. have agreed, at the request of the said A. B., to advance and lend him the further sum of £500 out of monies belonging to them upon a joint account, on having the repayment of the said sum of £500, with interest for the same after the rate hereinafter mentioned, secured in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £500 at or immediately &c., the receipt &c., (*supra*, *p.* 465), He the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors and administrators, that he the said A. B., his heirs, executors, or administrators, shall and will pay or cause to be paid unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £500, with interest for the same after the rate of £— per cent. per annum, on the —— day of —— next ensuing the date of these presents, without any deduction or abatement for any present or future taxes or impositions, or any other matter, cause, or thing whatsoever; and in case the said sum of £500 shall not be paid on the said —— day of ——, shall and will thenceforth, during the continuance of this present security, pay or cause to be paid unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of

Recital of state of original mortgage.

—of agreement for further charge.

Witnesseth.

Covenant for payment of the fresh advance.

for execution, or from other circumstances, it is not convenient to indorse the further charge on the original mortgage. In that case the deed of further charge should commence by reciting the mortgage in the usual way, (see infra, p. 644), setting out the parcels in the recital; and the subsequent parts of the instrument must refer to the recited deed, instead of to the within-written deed; "within mentioned" will become "said;" and the parties will be described in the usual manner. The draft will not in other respects differ from the indorsed deed, of which the precedent is given.

such survivor, their or his assigns, interest after the rate aforesaid for the said sum of £500, or for so much thereof as shall for the time being remain unpaid, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year: AND IT IS HEREBY AGREED and declared, and the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors, administrators, and assigns, that the messuages and other hereditaments by the within-written indenture released, or expressed and intended so to be, with their rights, easements, and appurtenances, and also the within-mentioned sum of £—— £3 per cent. Consolidated Bank Annuities, and the within-mentioned residue of the trust-monies, stocks, funds, and securities comprised in the secondly within-recited indenture, and the within-mentioned several sums of £—— £—— and £—— 3*l.* per cent. Reduced Bank Annuities, shall respectively be and remain a security for, and stand charged and chargeable with, the payment to the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, as well of the said sum of £500 and interest for the same, according to the covenant hereinbefore contained of the said A. B., as of the within-mentioned sum of £2,000, and all interest due and to grow due for the same; and that the same messuages and hereditaments, monies, stocks, funds, securities, and premises respectively, shall not in anywise be redeemed or redeemable but upon payment by the said A. B., his heirs, executors, administrators, and assigns, unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, as well of the said sum of £500 and interest for the same, according to the covenant hereinbefore contained in that behalf, as of the said sum of £2,000 and the interest due and to grow due for the same: AND IT IS HEREBY AGREED and declared, that the several provisions in the within-written indenture contained for reducing the interest of the within-mentioned sum of £2,000 to the rate of £—— per cent. per annum, and for restricting the said C. D. and E. F., their executors, administrators, or assigns, from

FURTHER CHARGE.

Further charge.

Power of sale and provisions in respect of the original mortgage to apply to the fresh advance.

FURTHER CHARGE.

calling in or compelling payment of the said sum of £2,000 until the —— day of ——, and for restricting the said A. B., his heirs, executors, administrators, or assigns, from paying off or compelling the said C. D. and E. F., their executors, administrators, or assigns, to receive payment of the said principal sum of £2,000 until the said —— day of ——, shall respectively extend and be considered to apply to the principal monies and interest intended to be secured by this present indenture, in the same manner as if the same several provisions were herein repeated and set forth with respect to the said sum of £500 and the interest thereof; and further, that the said C. D. and E. F., their executors, administrators, and assigns, shall have such and the same power of distress for securing or compelling payment of the interest to become due for the said sum of £500, as by the within-written indenture is given or provided for enabling the said C. D. and E. F., their executors, administrators, or assigns, to raise or compel payment of the interest on the said sum of £2,000; and further, that the power of sale in the within-written indenture contained for better securing the payment of the said sum of £2,000 and interest, and all trusts and provisions in relation thereto, shall extend and be applicable so as to be a further security for the said sum of £500 and interest, as well as if the said sum of £500 had formed part of the principal money secured by the within-written indenture (*b*). IN WITNESS &c.

(*b*) It should be observed, that there are few mortgages to which all the provisions in this last clause will be applicable.

LXXII.

TRANSFER *of* MORTGAGE *of* FREEHOLDS (*a*).

TRANSFER OF FREEHOLDS.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*mortgagee*], of the first part; C. D., of &c., [*mortgagor*], Parties.

(*a*) The law with respect to transfers of mortgages will be found ante, Vol. I. Art. MORTGAGES; and in Coote on Mortgages, Book II. Ch. 19, 2nd edit. The necessary parties to a transfer are the mortgagee and the assignee; but the mortgagor, or, if he be dead, his personal representatives, should always, if possible, be parties to acknowledge the existing amount of the mortgage debt. For the transferee of a mortgage is subject to all the equities and settlements of account between the mortgagor and the mortgagee. (*Earl of Macclesfield* v. *Fitton*, 1 Vern. 169; 1 Ch. Ca. 68; *Matthews* v. *Wallwyn*, 4 Ves. 118; *Williams* v. *Sorrell*, Id. 389; *Bradwell* v. *Catchpole*, 3 Swanst. 79). Thus, if before the transfer, or before notice of it has been given to the mortgagor, he pays the whole or any part of the debt to the mortgagee, the transferee can recover against the mortgagor only the amount actually due. (*Williams* v. *Sorrell*, ubi supra; *Chambers* v. *Goldwin*, 9 Ves. 234; *Norrish* v. *Marshall*, 5 Madd. 475). It would of course be sufficient for the above purposes to inquire of the mortgagor what is the amount of the mortgage debt, and to give him notice of the transfer; but as the evidence of the acknowledgment and notice is best preserved by his executing the transfer, it is the almost invariable practice to make him a party to it. Law relating to transfers of mortgages.

There are two methods in use of preparing transfers. The precedent in the text is an example of the first, which is used when the mortgagor can be made a party, and when there is no reason to suppose that there have been subsequent charges or dealings with the equity of redemption. In this method, the first witnessing part is an assignment of the mortgage debt; the second a conveyance by the mortgagee and mortgagor of the lands discharged of the old mortgage, but subject to a new proviso for redemption as in an original mortgage. The covenants for payment and title, powers, and provisoes, follow exactly as in an original mortgage. A transfer after this fashion is, in fact, a new mortgage, and gives the transferee all the rights of an original mortgagee; he has his own covenants to sue upon, and his own power of sale and other powers to exercise without being hampered as to any questions respecting the benefit of such covenants and powers passing to him as transferee. The assign- First method of effecting transfers.

TRANSFER OF FREEHOLDS.

of the second part; and E. F., of &c., [*transferee*], of the third part: WHEREAS, by an indenture of release bearing

Recital of mortgage.

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ment of the mortgage debt is of value only as shewing the intention that it shall be kept on foot as a protection against any mesne incumbrances which may have been created; the transferee having his own covenant of course never sues in the name of the mortgagee on the original covenant. Hence it is the practice of some gentlemen, in transfers of this kind, not to assign the mortgage debt, but merely to add to the habendum of the lands some words to the following effect:—

"freed and discharged from the said principal sum of £—— and all interest for the same, (except so far as that the same may be deemed to be subsisting and kept on foot, for the benefit of the said [*mortgagee*], his executors, administrators, and assigns, as against subsequent or mesne incumbrances or estates (if any), upon or in the said hereditaments and premises, or any of them), but subject nevertheless to the proviso for redemption hereinafter contained."

The employment of this plan shortens the draft, and there seems no other objection to it than that it is unusual.

Stamp duty on transfer.

It should be observed, that many persons have considered that this method of taking transfers with new proviso for redemption and a new covenant for payment, converts the proposed transfer into an original mortgage, liable to the payment of a fresh ad valorem stamp-duty. But the point is not generally deemed of any consequence by conveyancers, nor is the practice affected by it. (See ante, Vol. I., OF STAMPS ON ASSURANCES).

Second method of effecting transfers.

The second method of effecting transfers is used either when the mortgagor cannot be made a party, or when, although a party, he has charged or limited the equity of redemption. By this method, (of which the next precedent is an example), the assignment of the mortgage debt is made as in the first method, but the conveyance of the lands is by the mortgagee alone, and is made subject to the existing equity of redemption. The draft contains neither covenants nor powers, except the mortgagee's covenant against incumbrances; for if the mortgagor be not a party, of course there can be none; and even if he be a party, powers would be futile as against the subsequent incumbrancers, and covenants for title of little value. There is no objection, however, to arming the transferee with an original covenant for payment of the mortgage money and interest, although such a course is not very usual.

Plan to be pursued on transfer after death of mortgagor.

If the mortgagor be dead before the transfer, the first method cannot be adopted unless his heir or devisee be a party as well as his personal representatives. The second method can be used independently of the heir or devisee, and whether the personal representatives be or be not

date the —— day of ——, grounded on a lease for a year, and made, or expressed to be made, between the said C. D. of the one part, and the said A. B. of the other part, in consideration of the sum of £1,000 to the said C. D. paid by the said A. B., the said C. D. did grant and release unto the said A. B. ALL THAT &c., [*parcels*] (*b*), with their

TRANSFER OF FREEHOLDS.

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parties. If, however, they be not parties, the precautions previously pointed out as to inquiry and notice must be observed.

Transfers of mortgages of leaseholds and copyholds.

It should be observed, that the preceding observations as to the methods of effecting transfers are applicable chiefly to the cases of leaseholds and freeholds, and but partially to that of copyholds. Precedents of transfers of mortgages of copyholds will be found below. There is no precedent in the text of a transfer of mortgage of leaseholds, but the shape of such a transfer is exactly the same as that of a corresponding transfer of freeholds, and may be easily framed from the precedents in the text and the foregoing precedents of mortgages of leaseholds. (See, too, infra, Precedent LXXVII.).

Erroneous practice of assigning the power of sale.

It is the practice of some draftsmen, if there be a power of sale in the mortgage, to assign it by name on the transfer. But this course is totally wrong, for the power of sale, if properly framed, passes to the "assigns" of the mortgagee, by virtue of their character of assigns, and nothing which the mortgagee can do can give them the right to exercise the power, unless they take it by virtue of the designation in the original mortgage. It is true, that if the mortgagor be a party, he may give the transferee the right, independently of the original deed, to exercise the power; but then such an exercise would be effectual only against the mortgagor himself, and not against any subsequent incumbrancers. And if the mortgagor be so situated as to be capable of extending the provisions of the old power of sale, he will be competent to give a new power which will be much more convenient and effectual.

Advantage of taking transfers by indorsement.

It is to be observed, that the practice of taking transfers of mortgages by indorsement on the mortgage-deed is extremely desirable, and is always to be followed unless the residence of the mortgagor or mortgagee, or some other circumstance, renders it inconvenient to indorse the deed which is to be executed in the existing security. For, by taking the transfer by indorsement, the recital of the mortgage, and the setting forth the parcels, is avoided, and the reference to the powers and covenants is made most conveniently, and without any occasion for specifically noticing them in the transfer. There is no precedent in the text of a transfer by indorsement; but the shape of such a transfer differs in no respect from that of another transfer, except by omitting the recital of the mortgage, and referring to the within-written indenture and the within-named or within-mentioned persons or sums. (See the mode of reference in indorsed deeds, supra, Precedent, LXXI., p. 639).

Locus of parcels

(*b*) In transfers of mortgages the parcels are generally set forth in the

TRANSFER OF FREEHOLDS.

rights, easements, and appurtenances, to hold the same unto and to the use of the said A. B., his heirs and assigns, subject nevertheless to a proviso in the said indenture contained for redemption of the said premises on payment by the said C. D., his heirs, executors, administrators, or assigns, to the said A. B., his executors, administrators, or assigns, of the sum of £1,000 on the day therein mentioned, with interest for the same at the rate of £5 per cent. per annum, on the days and in manner therein mentioned: And in the said indenture now in recital is contained a covenant by the said C. D. with the said A. B., his executors and administrators, for payment of the said sum of £1,000 and interest: AND WHEREAS the said sum of £1,000 is still due and owing to the said A. B. on the securities aforesaid, but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS the said E. F. has agreed, at the request of the said C. D., to pay to the said A. B. the sum of £1,000 upon having a transfer, in manner hereinafter mentioned, of the said mortgage debt of £1,000 and interest, and the securities for the same: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £1,000 at or immediately before the sealing and delivery of these presents to the said A. B. paid by the said E. F., at the request and by the direction of the said C. D., (testified by his being a party to and executing these presents), (the receipt of which said sum of £1,000 he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns for ever by these

—of the principal money being due and interest paid.

—of agreement for transfer.

Witnesseth.

Consideration.

Receipt.

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in transfers of mortgage.

recital of the mortgage and conveyed by reference, in order that precisely the same property may be transferred as was originally mortgaged. If, however, when the mortgagor be a party, it be wished to have a new description of the property, or to include fresh property, the parcels may be given in the operative part, and the mortgagee's conveyance limited, "so far as relates to such of the lands and hereditaments hereinafter particularly mentioned, and intended to be hereby released, as were by the said indenture of the —— day of —— [*the mortgage*] granted and released or expressed and intended so to be."

presents), he the said A. B., at the request and by the direction of the said C. D. (testified as aforesaid) hath assigned and by these presents doth assign unto the said E. F., his executors, administrators, and assigns, ALL THAT the said principal sum of £1,000 due and owing to the said A. B. on his said security as hereinbefore is mentioned, and the interest henceforth to become due for the same, and the full benefit of the covenant entered into by the said C. D. with the said A. B. in and by the said indenture of the —— day of ——, for the payment of the said principal sum and interest, and of all other securities for the same: AND ALL the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of him the said A. B., of, in, to, out of, or upon the said premises or any of them, or any part thereof, TOGETHER with full power and authority to ask, demand, sue for, recover, and receive and give effectual receipts and discharges for the said sum of £1,000, and every part thereof, and the interest for the same, in the name or names of the said A. B., his executors or administrators (*c*), TO HAVE, HOLD, RECEIVE, AND TAKE the said sum of £1,000 and the interest henceforth to become due for the same, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said E. F., his executors, administrators, and assigns, to and for his and their own use and benefit: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B., at the request and by the direction of the said C. D., (testified as hereinbefore is mentioned), hath released, and by these presents doth release, and he the said C. D. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said E. F., (in his actual pos-

TRANSFER OF FREEHOLDS.

Assignment.

—of mortgage-debt.

—and all the estate, &c.

Power of attorney.

Habendum.

Conveyance of the lands.

(*c*) The mortgage-debt is recoverable at law by action on the covenant; but, being a chose in action, is not assignable at law, so as to enable the assignee to bring an action for it in his own name. Hence, a power of attorney must be given to the transferee to enable him to sue in the name of the mortgagee; see supra, p. 605, n. (*e*). As to the form to be employed, see supra, p. 613, n. (*b*).

Power of attorney in transfers of mortgages.

TRANSFER OF FREEHOLDS.

session now being by virtue of a bargain and sale hereof to him made by the said A. B. and C. D., in consideration of 5*s.* apiece &c., *supra*, *p.* 198), and his heirs and assigns,

Parcels.

ALL AND SINGULAR the said messuages, hereditaments, and premises by the said indenture of the —— day of —— granted and released, or expressed and intended so to be,

Habendum.

AND ALL the estate, &c., TO HAVE AND TO HOLD the said messuages and hereditaments, and all and singular other the premises hereby released, or expressed and intended so to be, unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns, freed and discharged from all right or equity of redemption under or by virtue of the said indenture of the —— day of ——, but subject to the proviso for redemption hereinafter contained (that is to say) [*proviso for redemption and covenant for payment of mortgage-money and interest as in original mortgage, supra, p.* 466]:

Proviso for redemption and covenant for payment.

Mortgagee's covenant against incumbrances.

AND THE SAID A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs, executors, administrators, and assigns, respectively, that he the said A. B. hath not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof he the said A. B. is in anywise prevented or hindered from assigning the said sum of £1,000, and the interest to become due for the same, or any part thereof, unto the said E. F., his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, or whereby or by reason or means whereof the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever.

mortgagor.

AND THE SAID C. D. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F.,

—for right to convey.

his heirs and assigns, in manner following; (that is to say), that they the said A. B. and C. D. now have in themselves good right, full power, and lawful and absolute authority to grant, release, and confirm all the said hereditaments

and premises hereinbefore released, or expressed and intended so to be, unto and to the use of the said E. F., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; AND ALSO THAT if default shall be made in payment of the said sum of £1,050, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said E. F., his heirs and assigns, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof to and for his or their own use and benefit, without any let, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B. and C. D., or either of them, their or either of their heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim, in or to the said hereditaments and premises, or any of them, or any part or parts thereof; AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise, by the said C. D., his heirs or assigns, saved, defended, kept harmless and indemnified, of, from, and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever: AND MOREOVER, THAT they the said A. B. and C. D., and each of them, their and each of their heirs, and all and every other persons and person whosoever, having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim, any estate, right, title, or interest, of, in, or to the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will from time to time and at all times hereafter, upon the request of the said E. F., his heirs or assigns, but at the costs and charges of the said C. D., his heirs, executors, or administrators,

TRANSFER OF FREEHOLDS.

—for quiet enjoyment after default.

—free from incumbrances.

—for further assurance.

TRANSFER OF FREEHOLDS.

make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying, and assuring all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, unto and to the use of the said E. F., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said E. F., his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required: PROVIDED ALSO, and it is hereby agreed and declared between and by the said C. D. and the said E. F., and the true intent and meaning of them and of these presents, nevertheless, further is, that it shall be lawful for the said C. D., his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof to his and their own use, until default shall be made in payment of the said sum of £1,050, or some part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said E. F., his heirs or assigns, or any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under him, them, or any of them. IN WITNESS &c.

Proviso for quiet enjoyment until default.

LXXIII.

TRANSFER *of* MORTGAGE *of* FREEHOLDS, *the* MORTGAGOR *being a Party and receiving a* FURTHER ADVANCE (*a*).

TRANSFER, WITH FURTHER ADVANCE.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagee*], of the first part; C. D., of &c., [*mortgagor*], of the second part; and E. F., of &c., [*transferee*], of the third part: [*Recites mortgage, see supra, p.* 644]: AND WHEREAS, by an indenture bearing date the —— day

Parties.

Recital of mortgage.

—of further charge.

(*a*) The precedent in the text is a very unusual form of transfer when a further sum is advanced; for, in such case, the original debt and the further advance are generally amalgamated, as in the next precedent, and the transfer is made with a new proviso and covenants, as in an original mortgage. (See the observations on the first method of transfer, supra, p. 643, n. (*a*), and see too the next precedent). In the case, however, to which the precedent in the text was adapted, mortgages had been made of the equity of redemption, which compelled the transfer of the existing mortgage to be made subject to the existing equity of redemption, (see supra, p. 644, n.). The further advance would of course be postponed to the mesne incumbrances.

Remarks on the precedent in the text.

The precedent in the text may be easily adapted to the case of a common transfer, subject to the existing equity of redemption, by detaching the parts which relate to the further advance.

It is to be observed, that interest converted into principal must be considered in the light of a further advance, and clearly cannot be so converted without the concurrence of the mortgagor. (*Earl of Macclesfield* v. *Fitton*, 1 Vern. 169; 1 Cha. Ca. 68; *Ashenhurst* v. *James*, 3 Atk. 271; *Anon.* 2 Cha. Ca. 258, overruling some earlier cases). And even with the concurrence of the mortgagor, interest cannot be converted into principal as against subsequent incumbrancers. (*Digby* v. *Craggs*, Amb. 612; *S. C.* 2 Eden, 200). But it seems that the rule does not apply to the conversion of costs and expenses into principal. (*Godfrey* v. *Watson*, 3 Atk. 518; *Manlove* v. *Bale*, 2 Vern. 84). See more on the subject of interest, supra, p. 510, n. (*f*).

As to conversion of interest into principal.

TRANSFER, WITH FURTHER ADVANCE.

of ——, indorsed on the said indenture of the —— day of ——, and made or expressed to be made between the said C. D. of the one part, and the said A. B. of the other part, in consideration of the sum of £500 to the said C. D. paid by the said A. B., the said C. D. did covenant with the said A. B., his executors, administrators, and assigns, that the said hereditaments comprised in the said indenture of the —— day of —— [*the mortgage deed*], should be charged with and be a security for the repayment as well of the said sum of £1,000 and interest as of the said sum of £500, with interest for the same, after the rate of £5 per cent. per annum; and in the said indenture now in recital was contained a covenant by the said C. D. with the said A. B., his executors and administrators, for payment of the said sum of £500 and interest: AND WHEREAS the said sums of £1,000 and £500 (making together the sum of £1,500) are still due and owing upon the respective securities aforesaid, but all interest on the same respectively has been paid up to the day of the date of these presents (*b*): AND WHEREAS the said E. F. has agreed,

—of the principal sums being due, and interest paid.

—of agreement for transfer.

As to the date of transfers of mortgages.

(*b*) When the transfer is made, subject to the existing equity of redemption, the recital in the text, as to the payment of interest, will serve if it bear date on one of the half-yearly days of payment of interest. And it is much more convenient, that the transfer should bear such date, for otherwise the mortgagee must be paid the accrued interest, either by the mortgagor or the transferee. If the mortgagor pay him, the old covenant for half-yearly payment of interest will cease to be available as the future half-yearly payments must be computed from the date of the transfer, and the provisions of the power of sale, and any other provisions which relate to the days of payment of interest, will cease to be applicable. If the transferee pay the accrued interest, he advances it till the next half-yearly day of payment, without receiving any interest for that advance, and of course he is seldom willing to do so. Perhaps the best course is, for the mortgagor to pay the interest up to the day of transfer, and to covenant with the transferee for the payment of the proportionate interest from the day of the transfer up to the next half-yearly day of payment, and for half-yearly payments thenceforward. (See the covenant for payment of interest, infra). It can hardly be thought, that this contravenes the rule as to interest stated supra, p. 510, n. (*f*).

When the transfer is made with a new proviso for redemption, and new covenants and a new power of sale, the date of the transfer is immaterial.

at the request of the said C. D., to pay to the said A. B. the sum of £1,500, upon having a transfer, in manner hereinafter mentioned, of the said mortgage-debts of £1,000 and £500 and interest, and the securities for the same respectively; and on the treaty for the said advance it was agreed that such covenants and agreements should be entered into as are hereinafter contained, for the payment of the interest to grow due for the said sum of £1,500: AND WHEREAS the said E. F. has also agreed to advance to the said C. D. the further sum of £200 upon having the repayment of the same, with interest after the rate hereinafter mentioned, secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £1,500, at or immediately before the sealing and delivery of these presents to the said A. B. paid by the said E. F., at the request and by the direction of the said C. D. (testified by his being a party to and executing these presents), (the receipt of which said sum of £1,500 he the said A. B. doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns for ever by these presents), the said A. B., at the request and by the direction of the said C. D., (testified as aforesaid), hath assigned and by these presents doth assign unto the said E. F., his executors, administrators, and assigns, ALL THOSE the said principal sums of £1,000 and £500 respectively due and owing to the said A. B. on his said securities as hereinbefore is mentioned, and the interest henceforth to become due for the same respectively, and the full benefit of the covenants entered into by the said C. D. with the said A. B. in and by the said indentures of the —— day of —— and the —— day of —— respectively, for the payment of the same principal monies and interest respectively, and of all other securities for the same: AND ALL THE ESTATE, right, title, interest, claim, and demand whatsoever, both at law and in equity, of him the said A. B. of, in, to, out of, or upon the said premises, or any of them, or any part thereof, TOGETHER with full power and authority to ask, demand, sue for, recover, and receive,

TRANSFER, WITH FURTHER ADVANCE.

—and further advance.

Witnesseth.

Consideration.

Receipt.

Assignment.

—of the mortgage debts.

—and all the estate.

Power of attorney.

TRANSFER, WITH FURTHER ADVANCE.

and give effectual receipts and discharges for the said sums of £1,000 and £500 respectively, and every part thereof respectively, and the interest for the same respectively, in the name or names of the said A. B., his executors or

Habendum.

administrators (*c*), TO HAVE, HOLD, RECEIVE, AND TAKE the said sums of £1,000 and £500, and the interest henceforth to become due for the same respectively, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said E. F., his executors, administrators, and assigns, to and for his and

Witnesseth, secondly.

their own use and benefit: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the

Conveyance.

said agreements and for the considerations aforesaid, the said A. B., at the request and by the direction of the said C. D. (testified as hereinbefore is mentioned), hath released, and by these presents doth release, unto the said E. F., (in his actual possession now being, by virtue of a bargain and sale thereof to him made by the said A. B., in consideration &c., *supra, p.* 198), and his heirs and

—of the mortgaged premises.

assigns, ALL AND SINGULAR the said lands, hereditaments, and premises by the said indenture of the —— day of —— granted and released, or expressed and intended so to be,

Habendum.

and all the estate &c., TO HAVE AND TO HOLD the said lands and hereditaments and all and singular other the premises hereby released, or expressed and intended so to be, unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns for ever, subject nevertheless to the right or equity of redemption subsisting in the same premises under or by virtue of the said indentures of the —— day of —— and the —— day of ——

Covenant by the mortgagee against incumbrances.

respectively: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs, executors, administrators, and assigns respectively, that he the said A. B. hath not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to, any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof he

(*c*) See supra, p. 647, note (*c*).

TRANSFER, WITH FURTHER ADVANCE.

the said A. B. is in anywise prevented or hindered from assigning the said sums of £1,000, and £500, and the interest to become due for the same respectively, or any part thereof respectively, unto the said E. F., his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, or whereby or by reason or means whereof the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever: AND THE SAID C. D. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his executors and administrators, that he the said C. D., his heirs, executors, or administrators, shall and will, until full payment of the said principal sums of £1,000 and £500, or the foreclosure of the said mortgaged premises, pay or cause to be paid unto the said E. F., his executors, administrators, or assigns, the interest henceforth to become due for the said sums of £1,000 and £500 after the rate aforesaid, by equal half-yearly payments, on the —— day of ——, which will be in the present year ——, and on the —— day of —— and the —— day of —— in every subsequent year; and that in case the said principal sums of £1,000 and £500 shall be paid to the said E. F., his executors, administrators, or assigns, on any other day than one of the said half-yearly days of payment of interest, a proportionate payment of such interest shall be made at the time of the payment of the principal money for the time which shall have elapsed of the then current half-year (*d*): AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and in consideration (*e*) of the sum of £200 at or immediately before the sealing and delivery of these pre-

Covenant by the mortgagor for payment of interest on the original mortgage debts.

Witnesseth, thirdly,—further advance, and covenant to repay the same, with interest.

(*d*) See supra, p. 652, n. (*b*). It should be remembered that the rate of interest cannot be increased as against mesne incumbrancers on the equity of redemption.

(*e*) It will be observed, that in this precedent the rule laid down, On stating the

TRANSFER, WITH FURTHER ADVANCE.

sents to the said C. D. paid by the said E. F., (the receipt &c., *supra*, *p.* 465), he the said C. D. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his executors and administrators, that he the said C. D., his heirs, executors, or administrators, shall and will, on the —— day of —— now next ensuing, pay or cause to be paid to the said E. F., his executors, administrators, or assigns, the sum of £200, with interest for the same after the rate of £— for every £100 for a year from the day of the date of these presents, without any deduction or abatement whatsoever for any present or future taxes, rates, assessments, or impositions, or any other matter, cause, or thing whatsoever: And further, that if the said principal sum of £200 shall not be fully paid to the said E. F., his executors, administrators, or assigns, on the said —— day of —— now next ensuing, he the said C. D., his heirs, executors, or administrators, shall and will thenceforth pay or cause to be paid to the said E. F., his executors, administrators, or assigns, interest for the said principal sum of £200, after the rate aforesaid, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year, so long as the said principal sum of £200, or any part thereof, shall remain unpaid: AND, for the considerations last aforesaid, the said A. B. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said E. F., his executors, administrators, and assigns, that the said hereditaments and premises hereinbefore released, or expressed and intended so to be, shall be and remain a security to the said E. F.,

Charge of the further advance on the mortgaged premises.

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whole consideration in the first witnessing part.

supra, p. 259, n. (*e*). of stating the whole consideration in the first witnessing part has not been followed. For in this case the further advance is by the frame of the draft made so totally distinct from the transfer of the original mortgage-debt and the securities for it, that it evidently becomes expedient to disconnect the statement of the considerations. If the charge for the further advance had been made along with the charge of the old debt, by means of the conveyance and a new proviso for redemption, as in the next precedent, then the considerations would have been stated together in the usual manner in the first witnessing part.

his executors, administrators, and assigns, for, and stand charged and chargeable with, the payment to him or them as well of the said sum of £200 hereinbefore covenanted to be paid as aforesaid, and the interest thereon, as of the aforesaid sums of £1,000 and £500, and the interest to become due for the same respectively: And that the same hereditaments and premises shall not in anywise be redeemed or redeemable but upon payment by the said C. D., his heirs, executors, administrators, or assigns, unto the said E. F., his executors, administrators, or assigns, as well of the said sum of £200 and all interest for the same, as of the said sums of £1,000 and £500, with the interest to become due for the same respectively (*f*). IN WITNESS &c.

TRANSFER, WITH FURTHER ADVANCE.

LXXIV.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

TRANSFER *of a* MORTGAGE *of* UNDIVIDED SHARES *of Freehold Estate and* FURTHER ADVANCE, *the old Mortgage being for a* TERM *of Years, which, on the Transfer, is assigned to* ATTEND THE INHERITANCE, *and the new Security being made in fee-simple.* COVENANTS *for* INSURANCE *against* FIRE. APPOINTMENT *of a* RECEIVER.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*old mortgagee*], of the first part; C. D., of &c., [*mortgagor*], of the second part; E. F., of &c., [*transferee*], of the third part; and G. H., of &c., [*trustee for transferee and receiver*], of the fourth part, [*recites an indenture of the 5th day of March*, 1791, *whereby a term of* 500 *years was created for securing* £1,000 *and interest at five per cent., the parcels being described in the recital--recites formally and in order of date, in the usual manner, several assur-*

Parties.

Narrative recitals.

(*f*) See supra, p. 627, n. (*b*); p. 621, n. (*d*).

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

ances and events whereby the mortgage-debt and term had become vested in A. B., and whereby the freehold and inheritance stood limited to the common uses to bar dower in favour of C. D.]: AND WHEREAS the said principal sum of £1,000 still remains due and owing upon the security of the said indenture of the 5th day of March, 1791, but all interest on the same has been paid up to the day of the date of these presents: AND WHEREAS the said E. F. has agreed, at the request of the said C. D., to advance and pay to the said A. B. the said sum of £1,000, and also to advance and lend to him the said C. D. the further sum of £1,000 upon having a transfer in manner hereinafter mentioned of the said mortgage-debt of £1,000 and interest, and the securities for the same, and upon having the repayment of the said sums of £1,000 and £1,000, making together the sum of £2,000, with interest after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned: AND WHEREAS, as part of the said security, it was agreed that the said premises comprised in the said term of 500 years should be assigned to the said G. H., his executors, administrators, and assigns, upon the trusts and in manner hereinafter mentioned, and that the said G. H. should be appointed receiver, with the powers and in manner hereinafter mentioned, of the rents and profits of the said undivided parts and other hereditaments intended to be hereby appointed and released, and that these presents should contain such covenants, clauses, and provisions in relation thereto as are hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £1,000 at or immediately before the sealing and delivery of these presents paid to the said A. B. by the said E. F., at the request and by the direction of the said C. D., (testified by his being a party to and executing these presents), (the receipt of which said sum of £1,000 he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns for ever by these presents), and also in consideration of the sum of £1,000 to the said A. B., at the same time paid by the

Recital of state of mortgage-debt.

—of agreement for transfer and further advance.

—of special agreement for the assignment of the term and the appointment of a receiver.

Witnesseth.

Consideration.

Receipt.

Further consideration.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

said E. F., (the payment and receipt in manner aforesaid of which said sums of £1,000 and £1,000 he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof respectively doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns for ever by these presents), He the said A. B., &c., [*assignment of the mortgage-debt of* £1,000 *and interest to E. F., see supra, p.* 647]: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations hereinbefore mentioned, and pursuant to and by force and virtue and in exercise and execution of the power or authority to him the said C. D. for this purpose given by the said indenture of the —— day of ——, [*the deed creating the power*], and of all and every other power or authority in anywise enabling him in this behalf, he the said C. D. doth by this present deed or writing by him sealed and delivered, (*see supra, p.* 211), direct, limit, and appoint that the five equal eighth parts intended to be hereinafter released of the said hereditaments hereinbefore and hereinafter particularly mentioned, shall henceforth go, remain, and be to the use of the said E. F., his heirs and assigns, subject to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, he the said C. D. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm, unto the said E. F., (in his actual possession, now being by virtue of a bargain and sale to him thereof made by the said C. D. &c., (*supra, p.* 198),) and his heirs, ALL THOSE the five undivided equal eighth parts or shares, and all other the parts or shares of him the said C. D., of or in all that the said messuage or tenement in ——, formerly called the ——, with the ground and appurtenances thereunto belonging, hereinbefore more particularly described, and now better known by the description following, (that is to say) [*modern description of parcels*], and of and in all out-houses &c., [*general words*], and of and in the reversion and reversions, &c., and all the estate, &c., TO HAVE AND TO HOLD the said parts or shares, and all

Receipt.

Assignment of debt.

Witnesseth, further appointment to transferee.

Witnesseth, further grant and release of the fee.

Parcels.

General words.

Habendum.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

and singular other the premises hereinbefore released, or expressed and intended so to be, unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns for ever, subject to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said C. D. and the said E. F., and the true intent and meaning of them and of these presents nevertheless is, that if the said C. D., his heirs, executors, administrators, or assigns, shall pay or cause to be paid to the said E. F., his executors, administrators, or assigns, the said sums of £1,000 and £1,000, making together the said sum of £2,000 (*a*), and the sum of £100 &c., [*supra, p.* 466]; [*Covenant by C. D. with E. F., his executors and administrators, for payment of mortgage-money, supra, p.* 467; —— *covenant by A. B. with E. F., his executors administrators, and assigns, that he has done no act whereby he is prevented from assigning the mortgage-debt and interest, supra, p.* 648 (*b*); —— *covenants by C. D. with E. F., his heirs and assigns, that the power is in force—for right to appoint and release—for quiet enjoyment—free from incumbrances—and for further assurance, supra, p.* 471: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said C. D. and E. F., and the true intent &c., [*proviso for quiet enjoyment by mortgagor until default, supra, p.* 474]: AND THE SAID C. D. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his executors, administrators, and assigns, that he the said C. D., his heirs, executors, administrators, or assigns, shall and will at all times, so long as any principal money or interest shall remain on the security intended to be hereby made, keep all and singular the messuages, buildings, and erections, the undivided parts whereof are hereinbefore expressed to have been appointed and released, well and sufficiently insured against loss or damage by fire, by a policy or policies

Proviso for redemption.

Covenants.

Proviso for quiet enjoyment until default.

Covenant by mortgagor to insure against loss by fire.

(*a*) Where there is a transfer and a further advance, the sums should be separately stated in the proviso for redemption, and mentioned as together forming the new debt.

(*b*) Of course, the words which in the covenant referred to follow "these presents," and which relate to the hereditaments, must be omitted.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

of insurance for a sum or sums not less in the whole than the sum of £——, and to be effected in the name of the said E. F. in some office for insurance in London or Westminster, and that he the said C. D. shall and will, immediately after such policy or policies shall have been effected, (or immediately after the execution of these presents if the same shall have been previously effected), leave and deposit the same with the said E. F., his executors, administrators, and assigns, and shall and will from time to time duly and punctually pay all and singular the premium or premiums, duty and other sums of money necessary for keeping on foot the said policy or policies, and shall and will make such payments at least ten days before the last day on which the same respectively must be paid, in order to keep on foot the said policy or policies, and shall and will forthwith deliver the receipt for every such payment unto the said E. F., his executors, administrators, or assigns: AND THAT it shall be lawful for the said E. F., his executors, administrators, and assigns, in case the said C. D., his heirs, executors, or administrators, shall neglect or refuse to make such payments as aforesaid, or any of them, at any time or times to pay such annual premium or premiums, duty and other sum and sums of money as aforesaid, so as to keep on foot the said policy or policies of insurance; and in case the same shall not be effected, or shall at any time become void or shall not continue on foot, then to insure and keep insured the said messuages, erections, and buildings in any office or offices for insuring against loss or damage by fire in London or Westminster, in any sum or sums not exceeding the sum of £——, and to pay all expenses of effecting such insurance or insurances, and the annual premium or premiums, duty, and sum and sums of money which shall from time to time become payable for keeping on foot such insurance or insurances: AND THAT the said C. D., his heirs, executors, or administrators, shall and will from time to time, on demand, pay or cause to be paid unto the said E. F., his executors, administrators, or assigns, all and every such sum and sums of money as shall have been paid or advanced by him the said E. F., his executors, administrators, or assigns, in or towards payment of any such premium or

—and that on neglect by mortgagor, mortgagee may insure.

—and for securing to the mortgagee the repayment of any sums he may advance for insurances.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

premiums, duty, sum or sums of money or expenses, with interest for the same after the rate aforesaid, from the time or respective times of the same having been advanced or paid, and that in the meantime and until such sum or sums of money shall be so repaid with interest as aforesaid, all and singular the said hereditaments and premises hereinbefore appointed and released, or expressed and intended so to be, shall stand and be charged with and shall not be redeemed or redeemable until full payment shall have been made as well of such sum or sums of money and the interest thereon as of the said principal sum of £2,000 and the interest thereon (*c*): [*Power of sale, supra, p.* 474]:

Witnesseth, further assignment of term.

AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement in this behalf, and for the considerations aforesaid, he the said A. B., at the request and by the direction of the said C. D., and on the nomination of the said E. F., (testified by their severally being parties to and executing these presents), hath assigned, and by these presents doth assign, unto the said G. H., his executors, administrators, and assigns, ALL

Parcels.

AND SINGULAR the undivided parts or shares and other the

(*c*) Some observations with regard to the law of fire insurance will be found supra, p. 499, n. (*d*). A clause is sometimes introduced into the covenants, that all monies received from the office shall either be laid out in rebuilding the property, or at the discretion of the mortgagee be applied in liquidation of the mortgage-debt. The clause is to the following effect:—

"and that all and singular the monies (if any) which shall become payable under or by virtue of any of the insurances aforesaid, shall at the option of the said [*mortgagee*], his executors, administrators, or assigns, be applied either in or towards satisfaction of the principal monies and interest, which shall for the time being be due or owing upon the security of these presents, or in repairing, reinstating, or rebuilding the buildings and premises which shall be damaged or destroyed."

A shorter set of covenants relating to fire insurances will be found, supra, p. 514. It will be observed, that there is not in this case any limit to the amount of the advances, as no stamp-duty is payable on advances for keeping up fire insurance. (See supra, p. 523, n. (*l*)).

parts or shares, hereditaments and premises by the said indenture of the —— day of —— [*the last assignment*] assigned to the said [*person through whom A. B. claims*], his executors, administrators, and assigns, for the residue then to come of the said term of 500 years as aforesaid; AND ALL the estate, &c., TO HAVE AND TO HOLD the said parts or shares and hereditaments, and all and singular other the said premises lastly hereinbefore assigned, or expressed and intended so to be, unto the said G. H., his executors, administrators, and assigns, for all the residue now to come of the said term of 500 years, IN TRUST for the said E. F., his heirs and assigns, and to assign and dispose of the same as he or they shall from time to time direct or appoint, and in the meantime upon trust to permit the residue of the said term of 500 years to wait upon and attend the freehold reversion and inheritance of the premises therein comprised, and to protect the same from all mesne incumbrances if any such there be, but subject as to the said term of 500 years, to the same right, title, and equity of redemption as the freehold reversion and inheritance of the same hereditaments and premises now are or hereafter shall or may be subject or liable to under or by virtue of the proviso hereinbefore contained for redemption of the same premises: [*covenant by A. B. with G. H., his executors, administrators, and assigns, against incumbrances, supra, p.* 458:] AND THIS INDENTURE ALSO WITNESSETH (*c*), that, in pursuance of the said agreement in this behalf, and in consideration of the premises, he the said C. D. (with the privity of the said E. F., testified by his being a party to and executing these presents) hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said G. H. to be receiver, agent, and attorney, from time to time, in the name of the said C. D., to ask, demand, collect, and receive all and every the rents and profits of the said undivided parts or shares, messuages

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

And the estate, &c.

Habendum.

In trust for the mortgagee, and to attend the inheritance.

Witnesseth, further, the appointment of a receiver.

(*c*) For some observations with regard to receivership deeds, see supra, p. 631, n. (*a*); p. 634, n. (*b*); p. 635, n. (*c*); p. 636, n. (*e*); and p. 638, n. (*f*). It will be seen, that in this case the receiver, being the trustee of the attendant term, has the advantage of possessing the legal estate.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

or tenements, hereditaments and premises, hereinbefore appointed and released, or expressed and intended so to be, from the present and future tenants and occupiers thereof, and the person and persons liable to pay the same respectively, as and when the same shall from time to time become due and payable; and in case of the nonpayment thereof, to take and use such lawful remedies for recovering and obtaining payment of the said rents and profits, or any part thereof, by action, suit, distress, or otherwise, as shall be thought necessary, and further to do, perform, and execute all other matters and things needful and requisite for collecting and receiving the said rents and profits, as fully and effectually to all intents and purposes as he the said C. D. could or might do; and the said C. D. doth hereby order and direct all and every the tenants and occupiers of all the said premises respectively, to pay unto the said G. H. all and singular the rents and profits of the said premises for the purposes hereinafter mentioned, and doth hereby declare that the receipts of the said G. H. shall be good and sufficient discharges to such tenants or occupiers and persons for such rents and profits as they shall respectively pay to him: AND IT IS HEREBY agreed and declared between and by the said C. D., E. F., and G. H., that all and every the rents and profits which shall be received by the said G. H. shall be held by him upon and for the trusts, intents, and purposes hereinafter mentioned, (that is to say), upon trust that he the said G. H. shall and do, by and out of the same, from time to time, IN THE FIRST PLACE pay all taxes, rates, assessments, and impositions whatsoever, now or hereafter to be taxed, charged, assessed, or imposed upon or in respect of the said premises, and which the respective tenants or occupiers thereof shall not be liable to pay; AND IN THE NEXT PLACE deduct and retain for his own use so much and such sums of money, not exceeding after the rate of £5 for every £100, as he shall reasonably deserve as a compensation and satisfaction for his cares, pains, troubles, and expenses in recovering and paying the said rents and profits in manner and for the purposes herein mentioned; AND IN THE NEXT PLACE pay to the said E. F., his executors, administrators, and assigns, by two equal half-yearly

—with direction to the tenants to pay to the receiver.

—whose receipts are to be good discharges.

Trusts of the rents and profits received by the receiver.

Firstly,—to pay outgoings.

Secondly,—to pay the receiver's salary.

Thirdly,—to pay interest of mortgage-debt.

payments on the —— day of —— and the —— day of —— in every year, interest for the said sum of £2,000, or for so much thereof as for the time being shall remain unpaid; AND IN THE LAST PLACE, pay the clear residue and surplus which shall remain of the said rents and profits, after answering the several purposes aforesaid, unto the said C. D., his executors, administrators, and assigns: AND THE SAID G. H. doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his executors, administrators, and assigns, and also with the said C. D., his heirs and assigns, in manner following, (that is to say), that he the said G. H. shall and will from time to time, so long as he shall be the collector or receiver of the rents and profits of the said premises, use his utmost endeavours to collect and receive the same, and shall and will from to time and at all times truly and punctually pay or cause to be paid in manner and to and for the ends, intents, and purposes aforesaid, all such monies as shall from time to time be collected or received by him the said G. H. by virtue of or under the aforesaid powers or authorities: AND THE SAID C. D. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said E. F., his executors, administrators, and assigns, in manner following, (that is to say), that he the said C. D. shall not nor will without the consent of the said E. F., his executors, administrators, or assigns, first had and obtained in writing signed with his or their hands, revoke the powers or authorities hereby given to the said G. H., or any of them, or do or suffer to be done any act, matter, or thing whereby the said powers or authorities hereby given, or any of them, may or shall become void or of no effect, OR hinder or obstruct him the said G. H., or any future receiver to be appointed as hereinafter is mentioned, in recovering, collecting, or receiving all or any of the rents and profits of the said premises, upon and for the trusts, intents, and purposes aforesaid, during such time as the said sum of £2,000, or any part thereof, shall remain on the security of the said premises or any of them: AND FURTHER, THAT, in case the said G. H. shall die, or by any

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

Lastly,—to pay surplus to mortgagor.

Covenant by receiver to perform his duty.

Covenants by mortgagor with mortgagee.

—not to revoke the powers of the receiver.

—or obstruct him in his duty.

—and to join in appointing a

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

disability be disqualified or rendered incapable to collect or receive the said rents and profits, or shall refuse or neglect to proceed therein in manner aforesaid, or shall otherwise misbehave himself in the trusts hereby in him reposed, whilst the said sum of £2,000, or any interest for the same or any part thereof respectively, shall continue on the aforesaid security, then and in any of the said cases, except the death of the said G. H., he the said C. D., his heirs or assigns, shall and will join with the said E .F., his executors, administrators, or assigns, in removing the said G. H. from the said employment, and shall and will in any of the said cases duly constitute, appoint, and authorize such other fit person or persons in the place or stead of the said G. H., as the said E. F., his executors, administrators, and assigns, shall from time to time nominate, to collect, receive, and pay the said rents and profits of the said premises, upon and for the trusts, intents, and purposes hereinbefore mentioned, and so from time to time, when and so often as the like case shall happen, until the said sum of £2,000 and all interest for the same shall be paid to the said E. F.; AND THAT in case the said C. D., his heirs or assigns, shall refuse or neglect so to do for the space of three calendar months next after the death, incapability, or misbehaviour of him the said G. H., or any other receiver so to be constituted as aforesaid, then and in such case, and so from time to time as often as the like case shall happen, it shall be lawful for the said E. F., his executors, administrators, and assigns, if they shall think fit, without the consent or concurrence of the said C. D., his heirs or assigns, to constitute or appoint some fit person to collect, receive, and pay the said rents and profits upon the trusts and for the intents and purposes aforesaid, with such reasonable salary for his care, pains, trouble, and expenses, as the said E. F. shall think fit, not exceeding £5 for every £100 to be received: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said E. F., his executors, administrators, and assigns, shall not in anywise be charged with or answerable for any loss, mis-application, or non-application of the rents and profits of the said premises

new receiver, if required.

—and that in case of mortgagor's neglect, mortgagee may appoint.

Mortgagee not to be answerable for defalcation of receiver.

or any part thereof, by reason of any default, neglect, or breach of trust of or in the said G. H., or any future collector or receiver to be appointed as aforesaid, but that such loss, mis-application, or non-application, and every receiver's salary, shall be wholly borne and paid by the said C. D., his heirs, executors, or administrators: PROVIDED ALWAYS, and it is hereby lastly agreed and declared between and by the parties to these presents, that the said G. H., or other the receiver or receivers so to be appointed as hereinbefore is mentioned, shall not act or assist in the execution of the trusts and powers hereinbefore contained, unless and until some half-yearly payment of interest on the said sum of £2,000, or some part thereof, shall be in arrear and unpaid for the space of one calendar month. IN WITNESS &c.

TRANSFER, WITH FURTHER ADVANCE AND ASSIGNMENT OF TERM.

Proviso that receiver shall not act until interest is in arrear.

LXXV.

TRANSFER *of* MORTGAGE *of* COPYHOLDS *which have* NOT *been* SURRENDERED, *the* MORTGAGOR *being* DEAD *and his Devisees* INFANTS (*a*).

TRANSFER OF COPYHOLDS NOT SURRENDERED.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagee*], of the first part: C. D., of &c., [*ex-*

Parties.

(*a*) It is settled that the equitable interest of a covenantee for surrender of copyholds may pass by assignment, and that the assignee may claim to be admitted on the surrender of the covenantor, without any further concurrence of the original covenantee, notwithstanding the covenant may have been presented by the homage. (*The King* v. *The Lord of the Manor of Hendon*, 2 T. R. 484). Some remarks on the objections to taking such equitable mortgages of copyholds, may be found supra, p. 600, n. (*b*); but it is to be observed, that in this case, from the infancy of the owners of the legal estate, the security cannot be altered, and the transferee will run less risk than in ordinary cases. For he may ascertain by inspection of the rolls that there is no existing legal mortgage, and the infants cannot make a subsequent legal mortgage to the transferee's prejudice until they attain the age of twenty-one years. It

Assignment of equitable interests in copyholds.

TRANSFER OF COPYHOLDS NOT SURRENDERED.

ecutrix of mortgagor], of the second part; and E. F., of &c., [*transferee*], of the third part: [*Recites mortgage, ut supra, p.* 644: *and will of mortgagor devising real estates to his children as tenants in common in fee, and appointing C. D. executrix:*] AND WHEREAS the said [*mortgagor*] died in the month of —— without having revoked or altered his said will, and leaving several children, all of whom are now infants under the age of twenty-one years: AND WHEREAS the said C. D. proved the said will on the —— day of —— in the —— Court of ——: AND WHEREAS no surrender was made of the said hereditaments in pursuance of the said covenant in that behalf in the said indenture contained: AND WHEREAS the said sum of £—— is now due and owing on the security of the said indenture of the —— day of ——, but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS the said A. B. having required payment of the said sum of £——, the said E. F., at the request of the said C. D., has agreed to pay to the said A. B. the said sum of £—— upon having a transfer, in manner hereinafter mentioned, of the said mortgage-debt of £—— and interest, and the securities for the same: NOW THIS INDENTURE WITNESSETH, that &c., [*assignment of the mortgage-debt and interest, supra, p.* 646; *substituting the executrix for the mortgagor*]: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the considerations aforesaid, he the said A. B., at the request and by the direction of the said C. D., (testified by her being a party to and executing these presents), hath assigned, and by these presents doth assign, unto the said E. F., his heirs

Recitals of mortgage and will of mortgagor.

—of death of mortgagor leaving infant devisees.

—of probate of will.

—of no surrender having been made of copyholds.

—of state of mortgage-debt.

—of agreement for transfer.

Witnesseth,—assignment of the money.

Further witnesseth,—assignment of the lands.

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will be an additional safeguard, if the transferee can procure the covenant for surrender to be presented by the homage as in the case above referred to, as there will then be a notice of his security on the rolls. He will of course obtain the custody of the copies of covenant roll and other muniments.

The executrix of the mortgagor is made a party, in order to acknowledge that the whole debt is still owing, for the transferee is bound by the state of account between the mortgagee and the estate of the mortgagor. (See supra, p. 643, n. (*a*)).

and assigns, THE SAID copyhold and customary messuages, lands, hereditaments, and premises hereinbefore particularly mentioned, and by the said indenture of the —— day of —— covenanted to be surrendered as aforesaid, with their rights, easements, and appurtenances: AND ALL the estate &c., TOGETHER with the benefit of the said covenant for the surrender of the said premises, and full power to sue thereon in the name or names of the said A. B. or his heirs, and all other powers and means necessary for enforcing the performance of the same, TO HAVE AND TO HOLD the said messuages, lands, and hereditaments, and all and singular other the premises lastly hereinbefore assigned, or expressed and intended so to be, unto the said E. F., his heirs and assigns, subject to such right or equity of redemption as is now subsisting in the said premises under and by virtue of the said indenture of the —— day of ——; [*Covenant by A. B. with E. F., his heirs, executors, administrators, and assigns, against incumbrances, supra, p.* 654]. IN WITNESS &c.

TRANSFER OF COPYHOLDS NOT SURRENDERED.

Parcels.

And benefit of covenant.

Habendum.

Covenant.

LXXVI.

TRANSFER *of* MORTGAGE *of* COPYHOLDS *where the Mortgagee has been* ADMITTED. *The Mortgagor receives a* FURTHER ADVANCE, *and covenants to surrender* OTHER COPYHOLDS.

TRANSFER OF COPYHOLDS AFTER ADMITTANCE.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., [*mortgagee*], of the first part; C. D., of &c., [*mortgagor*], of the second part; and E. F., of &c., [*transferee*], of the third part; [*Recites covenant by C. D. to surrender copyholds to A. B., his heirs and assigns, by way of mortgage for securing £1,000 and interest at £5 per cent., supra, p.* 598]: AND WHEREAS, at a court holden in and for the said manor of —— on the —— day of ——, the said C. D., in pursuance of the said covenant in that behalf in the said indenture contained,

Parties.

Recital of mortgage.

—of surrender and admittance.

TRANSFER OF COPYHOLDS AFTER ADMITTANCE.

duly surrendered the said hereditaments and premises to the use of the said A. B., his heirs and assigns, in manner and subject as in the said indenture and hereinbefore is mentioned; and at the same court A. B. was admitted tenant of the same premises accordingly: AND WHEREAS the said principal sum of £1,000 still remains due and owing upon the securities aforesaid, but all interest for the same has been paid up to the day of the date of these presents: AND WHEREAS, [*recites agreement for transfer and further advance, supra, p.* 652]: NOW THIS INDENTURE WITNESSETH, that &c., [*assignment of mortgage-debt and interest, supra, p.* 646]: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, he the said A. B., at the request and with the privity of the said C. D., (testified by his being a party to and executing these presents), and so far as relates to the acts and deeds of him the said A. B., and the acts and deeds of his heirs, and as to such of the hereditaments hereinafter particularly mentioned or referred to as were comprised in the said surrender of the —— day of ——, doth hereby for himself, his heirs, executors, and administrators, and he the said C. D., as to all and singular the said hereditaments hereinafter particularly mentioned or referred to, doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F. and his heirs, that they the said A. B. and C. D., or their respective heirs, shall and will, at or before the next court to be holden in and for the said manor of ——, at the costs and charges of the said C. D. or his heirs, well and effectually surrender or cause or procure to be surrendered by all proper parties into the hands of the lord or lady, lords or ladies of the said manor of ——, [*parcels—part being described by reference to the previous covenant and conditional surrender and admittance, and part by description and reference to the admittance of the mortgagor, see supra, p.* 316—*general words*], TO THE USE of the said E. F., his heirs and assigns, to be holden of the lord or lady, lords or ladies of the said manor, according to the custom thereof, by and under the rents, fines, heriots, suits, and services therefore due and of right accustomed, FREED and absolutely discharged from the said

—of debt remaining due and interest having been paid.

—of agreement for transfer and further advance.

Witnesseth,—assignment of debt.

Witnesseth,—further covenant to surrender.

Parcels.

—to the use of transferee.

—discharge of former mortgage.

conditional surrender of the —— day of ——, BUT SUBJECT nevertheless to a proviso for making void the said surrender hereby covenanted to be made if the said C. D., his heirs, executors, administrators, or assigns, shall pay or cause to be paid to the said E. F., his executors, administrators, or assigns, the sums of £1,000 and £1,000, making together the sum of £2,000, and the sum of £100 as and for one year's interest for the same at the rate of £5 per cent. per annum, making &c., *see supra, p. 567*; [*Covenants—by C. D. with E. F., his executors and administrators, for payment of mortgage-money and interest, supra, p. 469*;—*by A. B. with E. F., his heirs, executors, administrators, and assigns, against incumbrances, supra, p. 654*;—*by C. D. with E. F., his heirs and assigns, for seisin by C. D. of such of the hereditaments as were not comprised in the mortgage to A. B.—that A. B. and C. D. respectively have right to surrender—for quiet enjoyment—free from incumbrances—and for further assurance—Proviso for quiet enjoyment until default, supra, p. 567—Power of Sale, supra, p. 474*]. IN WITNESS &c. (*a*).

TRANSFER OF COPYHOLDS AFTER ADMITTANCE.

—but subject to a new condition for redemption.

Covenants and provisoes.

(*a*) If it be considered desirable that the mortgage should be transferred subject to the subsisting equity of redemption, (see supra, p. 644, n.), the object will be accomplished by making the mortgagee alone covenant for the surrender to the transferee, "subject to such right or equity of redemption as is now subsisting in the same premises under or by virtue of the said surrender of the —— day of ——." The covenants, (except the mortgagee's covenant against incumbrances), the provisoes, and power of sale, will in such case be omitted. (See the frame of such a mortgage, supra, Precedent LXXIII., p. 651).

LXXVII.

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

TRANSFER *of* MORTGAGE (*part of the Debt having been paid off*) *of* FREEHOLDS, COPYHOLDS, (*which have been surrendered*), *and* LEASEHOLDS (*a*), *the* MORTGAGEE *being* DEAD, *and his* HEIR *and* ADMINISTRATOR *joining.*

Parties.

THIS INDENTURE, made &c. BETWEEN A. B., of &c., and C. D., of &c., [*co-heirs of mortgagee*], of the first

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Conveyance by infant heir of mortgagee.

—at common law.

—under the statutes 7 Anne, c. 19, and 4 Geo. 3, c. 16.

(*a*) On the death of a mortgagee of freehold or copyhold property, the legal estate, (if not disposed of by his will), descends to his heir at law, or customary heir, and great difficulty is often experienced in procuring a conveyance of it, from the heir being an infant, or inaccessible or not ascertained. At common law, an infant might convey, although his conveyance would be voidable on his coming of age; and it seems that as this conveyance of an infant trustee or mortgagee would, if he were of age, be compulsory, he would not on coming of age be allowed to avoid it. (*Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1794; —— v. *Handcock*, 17 Ves. 383). But of course it would be improper to rely on this doctrine, and a partial remedy was provided by the stat. 7 Anne, c. 19, which enabled and made it compulsory on infant trustees and mortgagees to convey under the direction of the Court of Chancery. This act, however, extended only to declared and not to implied trusts; (*Godwin* v. *Lyster*, 3 P. Wms. 387); and to no case in which the infant had any duty to perform. (*Attorney-General* v. *Pomfret*, 2 Cox, 221; *Ex parte Chasteney*, Jac. 56); or had any beneficial interest. (*Hawkins* v. *Obeen*, 2 Ves. Sen. 559). It applied to estates in the colonies; (*Ex parte Anderson*, 5 Ves. 243); and under its authority an infant could levy a fine, (*Ex parte Maire*, 3 Atk. 479), or suffer a recovery. (*Ex parte Smith*, Amb. 624; *Ex parte Johnson*, 3 Atk. 559). The statute 4 Geo. 3, c. 16, contained similar enactments to those in the above-mentioned act with respect to lands in the Duchy of Lancaster, the counties Palatine, and Wales.

Conveyance by lunatic trustees and mortgagees under the statutes

Idiots and lunatics are incapable of binding themselves by deed; (Co. Lit. 247. a.; *Thompson* v. *Leach*, 2 Salk. 427); and to remedy the inconvenience of trustees and mortgagees being idiots or lunatics, the stat. 4 Geo. 2, c. 10, enabled and made it compulsory on them to convey,

part; E. F., of &c., [*administrator of mortgagee*], of the second part; G. H., of &c., [*mortgagor*], of the third part;

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

under the direction of the Lord Chancellor. This act only extended to idiots or lunatics found so by inquisition; (*Ex parte Gillam*, 2 Ves. Jun. 587); or by a judicial proceeding abroad in the nature of a commission; (*Ex parte Lewis*, 1 Ves. 298; and see *Ex parte Marchioness of Annandale*, Amb. 80; *In the Matter of Houstoun*, 1 Russ. 312); but the provisions of it were, by the statute 2 Geo. 4, c. 114, extended to the case of lunatics not having been so found.

4 Geo. 2, c. 10, & 2 Geo. 4, c. 114.

The whole of the preceding statutes were repealed by the statute 6 Geo. 4, c. 74, which made fresh provisions relative to conveyances by infant, lunatic, and idiot trustees and mortgagees, and was itself repealed by the statute 11 Geo. 4 & 1 Will. 4, c. 60. Constructive trusts were not provided for by the statute, 4 Geo. 4, (*Dew* v. *Clark*, 4 Russ. 514); but many of the enactments of the existing act were contained in it. The statute now in force with respect to conveyances of mortgaged and trust estates, where a conveyance cannot be had according to the ordinary rules of law, is the statute 11 Geo. 4 & 1 Will. 4, c. 60.

Conveyances of mortgaged and trust estates under the statute 6 Geo. 4, c. 74.

The 3rd section of this statute enacts, "that where any person seised or possessed of any land upon any trust or by way of mortgage shall be lunatic, (that is, (see sect. 2), 'lunatic, idiot, of unsound mind, or incapable of managing his affairs'), it shall be lawful for the committee of the estate of such person, by the direction of the Lord Chancellor of Great Britain, being intrusted by virtue of the King's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, to convey such land in the place of such trustee or mortgagee, to such person and in such manner as the said Lord Chancellor shall think proper; and every such conveyance shall be as effectual as if the trustee or mortgagee being lunatic had been of sane mind, memory, and understanding, and had made and executed the same."

Conveyances by lunatics under the statute 11 Geo. 4 & 1 Will. 4, c. 60.

The 5th section of the statute empowers the Lord Chancellor, "intrusted as aforesaid" to appoint any person he may think fit to convey in the place of a lunatic trustee or mortgagee who has not been found lunatic by inquisition, and who is not entitled to receive a larger sum than £700 for his own benefit.

The 26th section of the statute extends the operation of the 3rd and 5th sections to all his Majesty's dominions, except Scotland and Ireland; and the 27th section gives the same powers in Ireland to the Lord Chancellor of Ireland. The 28th section declares, that the powers given by the act to the Lord Chancellor intrusted with the care of lunatics, may be exercised by the Lord Keeper or commissioners of the great seal when similarly intrusted.

But it must be observed, that the powers given by the acts can only be exercised by the person or persons for the time being intrusted by virtue

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

and I. K., of &c., [*transferee*], of the fourth part; [*Recital of leases*]: AND WHEREAS, by an indenture of appointment

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Recital of leases.

—of mortgage.

of the sign manual with the custody of the persons and estates of lunatics. (*In re Shorrocks*, 1 My. & Cra. 31; *In the matter of Prideaux*, 2 My. & Cra. 640). With respect to the shape of the orders of reference under the act, see *In the matter of Pigott*, (2 Russ. & My. 683). See, too, the 11th and 25th sections, and the observations infra.

By the 20th section of the statute, the foregoing provisions are extended to include all persons being lunatic, who by force of any law for payment of debts out of real estate would, or thereafter might be, compelled to convey any land if of sound mind. (See *Ex parte Tutin*, 3 Ves. & Bea. 150; and supra, p. 235, n. (*e*); see, too, *Scholefield* v. *Heafield*, 8 Sim. 470; *Ball* v. *Harris*, Id. 485; *Holme* v. *Williams*, Id. 557; *Smethurst* v. *Longworth*, 2 Keen, 603; and the recent statute 2 & 3 Vict. c. 60).

Conveyances under the act 11 Geo. 4 & 1 Will. 4, c. 60, by infant trustees and mortgagees.

By the 6th section of this act, any person seised or possessed of any land upon any trust, or by way of mortgage, being under the age of twenty-one years, is enabled to convey the same by the direction of the Court of Chancery to such person and in such manner as the court shall think proper. The seventh section contains a similar enactment as to lands situate in the Duchy of Lancaster, the Counties Palatine, and Wales, which however, so far as relates to Chester and Wales, is rendered superfluous by the stat. 11 Geo. 4 & 1 Will. 4, c. 70, § 14, abolishing their peculiar courts.

—and by persons appointed to convey by the Court of Chancery. (Section 8).

The 8th section of the act enacts, "That where any person seised of any land upon any trust, shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid, be living or dead, or if known to be dead, it shall not be known who is his heir, or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same, then and in every or any such case it shall be lawful for the said Court of Chancery to direct any person whom such Court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the said Court shall think proper, and every such conveyance shall be as effectual as if the trustee seised as aforesaid, or his heir, had made and executed the same."

—in the case of constructive trusts. (Section 18).

The 18th section of the act extends all the provisions thereinbefore contained, to every case (other than the cases therein mentioned) of a constructive trust or trust arising or resulting by implication of law; but provides, that in every case where the alleged trustee has or claims a beneficial interest adversely to the party seeking a conveyance or

and release, assignment and covenant, bearing date the —— day of ——, grounded so far as the same operated as

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

transfer, no order shall be made for the execution of a conveyance or transfer by such alleged trustee, until after it has been declared by the Court of Chancery in a suit regularly instituted in such court, that such person is a trustee for the person so seeking a conveyance or transfer.

Observations on the 8th and 18th sections.

Now it will be seen, that the 8th section applies only to trustees, and therefore, where a mortgagee died intestate and his heir was not known, it was held, that the Court could not by the help of the 18th section, on payment of the money, appoint a person to reconvey. (*In re Goddard*, 1 My. & Ke. 25; *In re Newman*, Law Journal, Vol. 13, p. 124; *In re Stanley*, 5 Sim. 320; *In re Dearden*, 3 My. & Ke. 508). And so likewise, where the devisees of a mortgagee refused to convey. (*Ex parte Payne*, 6 Sim. 645). But where a mortgagee had obtained a decree for sale (in Ireland) and then died, it was held that his infant heir was a trustee within the meaning of the 8th and 18th sections. (*Prendergast* v. *Eyre*, Lloyd & Goold, Cas. Tem. Sug. 11).

Statute 4 & 5 Will. 4, c. 23, s. 2.

In order to remedy the difficulty which arose in the preceding cases, it was enacted by the statute 4 & 5 Will. 4, c. 23, s. 2, that where any person seised of any land upon trust, or by way of mortgage, dies *without an heir*, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act 11 Geo. 4 & 1 Will. 4, c. 60, in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir.

Observations on the act 4 & 5 Will. 4, c. 23, s. 2.

It was held, that this act, by providing for the case of a mortgagee dying without an heir, by reference to the act of the 11 Geo. 4 & 1 Will. 4, c. 60, assumed that the 8th and 18th sections of the last-mentioned act did apply to the case of a mortgagee having left an heir who was unknown. (*Ex parte Whitton*, 1 Keen, 278; *In re Stanley*, 7 Sim. 170). But the correctness of these decisions was doubted, and in consequence the act of the 1 & 2 Vict. c. 69 was passed, by which it was enacted,

Statute 1 & 2 Vict. c. 69.

"That where any person seised of any land by way of mortgage, shall have departed this life without having been in possession of such land, or in the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been or shall be paid to his executor or administrator, and the devisee or heir or other real representative or any of the devisees or heirs or real representatives of such mortgagee shall be out of the jurisdiction, or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several devisees or representatives who were joint tenants, which of them was the survivor, or it shall be uncertain whether any such devisee or heir or representative be living or dead, or if known to be dead, it shall not be known who was his heir, or where such mortgagee or any such devisee or heir or representative shall have died without an heir, or if any such

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

a release on a lease for a year, and made or expressed to be made between the said G. H. of the one part, and the

devisee or heir or representative shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by any person entitled to require the same, then and in every such case it shall be lawful for the said Court of Chancery to direct any person whom such Court may think proper to appoint for that purpose, in the place of the devisee, heir, or representative, (whether such devisee, heir, or representative, shall or shall not have a beneficial interest in the money paid to the executor or administrator as aforesaid), to convey such land in like manner as by the said first-recited act the said Court is empowered to appoint a person to convey in the cases therein mentioned, in the place of a trustee or the heir of a trustee, and every such conveyance shall be as effectual as if such devisee or heir or representative had executed the same." And by section 2, "That the words used in this act shall have the same effect in England and in Ireland, and shall embrace the same objects, as they would have had and embraced if the provision hereinbefore contained had formed part of the said recited acts, (the acts 11 Geo. 4 & 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23), or either of them."

But the 3rd section of the act provided, "That the said recited acts, or either of them, shall not be construed to extend to any case of any person dying seised of any land by way of mortgage, other than such as are hereinbefore expressly provided for."

Observations on the statute 1 & 2 Vict. c. 69.

It seems that the 3rd section of the last-mentioned act did not operate as a repeal of the 6th section of the act 11 Geo. 4 & 1 Will. 4, c. 60, so as to affect the case of a mortgagee dying and leaving an infant heir. (*In re Gathorne*, 8 Sim. 392; 1 Beav. 208). And it has been decided by the Vice-Chancellor, that the case of its being uncertain whether a mortgagee has left an heir is still within the 8th section of the 11 Geo. 4 & 1 Will. 4, c. 60. (*In re Wilson*, 8 Sim. 392). But the judgment in the last case seems to have been grounded on a misapprehension of an opinion of the Master of the Rolls, (see 1 Beav. 208), and is therefore of less authority. It has been recently held, that the case of a mortgagee himself being out of the jurisdiction does not come within any of the acts, (*Green* v. *Holden*, 1 Beav. 207), on the ground that the 3rd section of the stat. 1 & 2 Vict. c. 69, precludes the constructive extension of the 8th section of the stat. 11 Geo. 4 & 1 Will. 4, to any other case than that mentioned in the 1st section of the stat. 1 & 2 Vict. c. 69.

Further observations on the act 11 Geo. 4 & 1 Will. 4, c. 60, s. 8.

Where a trustee refuses to execute a deed which has been tendered to him, and a person is appointed under the authority of the 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, to convey in his place, it is not necessary that the person so conveying should execute a new deed reciting the order; he may execute the deed tendered to the trustee, it being expressed in the

said [*mortgagee*] of the other part, it was firstly witnessed, that, in consideration of the sum of £7,000 by the said

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

attestation clause that he has executed it in the place of the trustee in pursuance of the order. (*Ex parte Foley*, 8 Sim. 395). The statute does not apply to the assignment of the mortgage debt, but only to the legal interest in the subject of the mortgage; (*Price* v. *Dewhurst*, 8 Sim. 617); and does not apply to lands out of the Queen's dominions. (Ibid). It seems that the captain of a vessel on a voyage to India is not out of the jurisdiction of the court within the meaning of the statute. (*Hutchinson* v. *Stephens*, 5 Sim. 498).

—of the freeholds.

The 9th section of the statute 11 Geo. 4 & 1 Will. 4, c. 60, relates to terms of years; it enacts, "That where any person possessed of any land for any term of years upon any trust shall be out of the jurisdiction of, or not amenable to, the process of the Court of Chancery; or it shall be uncertain whether the trustee last known to have been possessed as aforesaid be living or dead, or if any trustee possessed as aforesaid, or the executor of any such trustee, shall neglect or refuse to assign or surrender such land for the space of twenty-eight days next after a proper deed for making such assignment or surrender shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same, then and in every or any such case it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose in the place of the trustee or executor, to assign or surrender such land to such person and in such manner as the court shall think proper; and every such assignment or surrender shall be as effectual as if the trustee possessed as aforesaid, or his executor, had made and executed the same."

Assignments by persons appointed to assign in default of trustees of terms of years. (Section 9).

This section is less extensive than those which relate to real estate, because the want of a personal representative is to be supplied by taking out administration in the regular way in the ecclesiastical court. (*In the matter of Anderson*, Lloyd & Goold, Cas. Tem. Sug. 27). Executors having performed their duties and invested funds upon the trusts of the will, are trustees within the meaning of the act. (*Ex parte Dover*, 5 Sim. 500). And where the executor of the survivor of trustees refused to prove the will, it was held that the case came within the statute. (*Ex parte Hagger*, 1 Beav. 98). It should be observed, that these cases were not decided on the construction of the 9th section, but on the similar clauses relating to stocks in the names of trustees.

The 13th section of the statute provides, that infants, lunatics, and other persons under disability, who are thereby directed to convey, may be compelled to convey, as if they were under no disability. The 16th section extends the provisions of the statute to trustees having an interest or duty to perform. (See the cases decided on the act, 7 Anne, c. 19, supra, and *Hutchinson* v. *Stephens*, 5 Sim. 498). The 16th section declares, that the heirs of vendors who have not conveyed, and persons in

Persons under disability to be compelled to convey.

Act to extend to trustees having an interest or duty.

—and to ven-

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

[*mortgagee*] to the said G. H. paid, the said G. H. did direct, limit, and appoint, and also grant, release, ratify,

dors, nominal purchasers, and other constructive trustees.

whose names estates have been purchased for others, shall be trustees within the meaning of the act. And the 17th section enables tenants for life, and other persons having a limited legal estate in lands contracted to be sold, but afterwards settled before conveyance, to convey the whole fee. The 18th section, as before mentioned, extends the provisions of the act to other constructive trusts; but it is to be observed, that an exchange, even where a sum of money paid for equality forms part of the consideration, is not within the meaning of these sections. (*Turner* v. *Edgell*, 1 Keen, 502). The husbands of female trustees are declared to be trustees within the meaning of the act. (s. 19). See, too, before the act, *Ex parte Maire*, 3 Atk. 478; *Ex parte Johnson*, Id. 539).

—does not extend to an exchange.

—extends to husbands of female trustees.

Forms of proceeding under the statutes.

The form of proceeding under these acts is pointed out by the statute, 11 Geo. 4 & 1 Will. 4, c. 60, s. 11. The order is to be made upon petition in any cause, or in the lunacy or matter; (see *In re Fowler*, 2 Russ. 449); and the petitioner may be one of the persons beneficially entitled, or a trustee, guardian, or committee, as the case may be. With respect to the shape of the order of reference, see *In the matter of Pigott*, (2 Russ. & My. 683); *Price* v. *Shaw*, (2 Dick. 732); *Ex parte Swan*, (Id. 749). The 12th section of the act empowers the Court of Chancery to direct a bill to be filed for the establishment of the right of the party seeking a conveyance; (see *Goodson* v. *Ellison*, 3 Russ. 583; *Angier* v. *Stannard*, 3 My. & Ke. 566); but the court is the judge whether the circumstances require a bill, or whether the order may be made on petition. (*In the matter of the De Clifford estates*, 2 My. & Ke. 624 & 820, overruling *Ex parte Merry*, 1 My. & Ke. 677; see, too, *Ex parte Dover*, 5 Sim. 500). It seems to be now settled, after some fluctuation of decision, that where a bill is filed for the purpose of having an infant heir declared a trustee for a purchaser, and a decree is made accordingly, the court will direct a conveyance to the purchaser by the same decree, and without a petition for the purpose. (*Miller* v. *Knight*, 1 Keen, 129, and note). An order, however, cannot be made on motion. (*Anon.* 1 You. & Col. 75).

—and costs.

The costs of proceedings under the statute are provided for by the 25th section, which enables them to be raised out of the land to be conveyed, or otherwise, as the court shall direct. If a bill be filed by a purchaser under the 12th section for the purpose of having an infant heir declared a trustee, it is understood that the costs of the suit should be paid by the vendor, as between party and party. If a suit be rendered necessary by a trustee's refusing to convey, he will be ordered to pay all the costs of the suit. (*Jones* v. *Lewis*, 1 Cox, 199; *Manners* v. *Charlesworth*, 15th April, 1833, cited in Jemmett's edition of Sugden's Acts, 156. But see *Angier* v. *Stannard*, 3 My. & Ke. 566).

General clauses extending the powers of the acts.

The 29th section of the act extends the powers and authorities thereby given to the Court of Chancery to all his Majesty's dominions, except

and confirm (*b*) unto the said [*mortgagee*] and his heirs, ALL THAT &c., [*freehold parcels*], to hold the same unto and to the use of the said [*mortgagee*], his heirs and assigns, subject nevertheless to the proviso thereinafter contained and hereinafter mentioned for redemption of the same premises; AND by the said indenture now in recital it was secondly witnessed, that for the considerations aforesaid the said G. H. did covenant with the said [*mortgagee*], his heirs and assigns, that he the said G. H., or his heirs, would, at the costs and charges of him the said G. H., his heirs, executors, or administrators, at or before the next court to be holden in or for the said manor of ——, surrender or cause to be surrendered into the hands of the lord or lady of the said manor, ALL THAT &c., [*first copyhold parcels*], to the use of the said mortgagee, his heirs and assigns, to be holden of the lord or lady of the said manor, by the rents and services therefore due and of right accustomed, and would cause the said [*mortgagee*], his heirs or assigns, to be admitted tenant or tenants thereto accordingly, such surrender however, when made, to be subject to the proviso thereinafter contained and hereinafter mentioned for the redemption of the same premises, [*recites third witnessing part—similar covenant to surrender copyholds held of manor of F.*]; AND by the said indenture now in recital it was fourthly witnessed, that, for the considerations aforesaid, the said G. H. did assign unto the said [*mortgagee*], his executors, administrators, and assigns, FIRSTLY, ALL THAT &c., [*leasehold parcels*], to hold the same unto the said [*mortgagee*], his executors, administrators, and assigns, for the respective terms and subject as thereinafter and hereinafter mentioned, (that is to say), as, to, for, and concerning the premises firstly thereinbefore and hereinbefore mentioned, for all the residue then to come of the said term of sixty years, under and subject never-

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

—of copyholds

—of other copyholds.

—leaseholds.

Scotland, and the 30th section confers them on the Court of Exchequer. The 31st section gives similar powers in respect of Irish lands to the Irish courts of Chancery and Exchequer.

(*b*) With respect to the informality of this form, see supra, p. 212, n. (*g*).

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

theless to the rents, covenants, and agreements, by and in the said indenture of the —— day of —— [*the lease*] reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be paid, observed, and performed, and as to, for, and concerning &c., [*similar recitals for the premises comprised in the other leases thereinbefore mentioned*], and subject as to all the aforesaid premises thereby assigned, or expressed and intended so to be, to the proviso thereinafter contained and hereinafter mentioned for redemption of the same premises. And in the said indenture now in recital was contained a proviso for redemption of all and singular the said freehold, copyhold, and leasehold hereditaments, on payment by the said G. H., his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £7,000 on the —— day of ——, with interest for the same after the rate of £5 per cent. per annum in the meantime, on the days and in manner therein mentioned. AND WHEREAS, at a court holden in and for the said manor of ——, on the —— day of ——, the said premises held of the said manor of ——, and by the said indenture of the —— day of —— covenanted to be surrendered as aforesaid, were duly surrendered in pursuance of the same covenant into the hands of the lord of the said manor to the use of the said [*mortgagee*], his heirs and assigns for ever, according to the custom of the said manor, subject nevertheless to a condition for making void the said surrender corresponding to the proviso for redemption in the said indenture of the —— day of —— contained and hereinbefore mentioned, [*similar recital of surrender of the other copyhold premises:*] AND WHEREAS the said [*mortgagee*] died on the —— day of —— intestate and a bachelor, leaving the said A. B. and C. D. his co-heiresses at law: AND WHEREAS letters of administration of the goods and chattels, rights and credits of the said [*mortgagee*] were granted on the —— day of —— by the Prerogative Court of the Archbishop of Canterbury to the said E. F.: AND WHEREAS all interest for the said sum of £7,000 has been paid up to the day of the date of these presents, and the sum of £2,000 has been paid by the said G. H. to the said

—with proviso for redemption.

—of surrender of part of the copyholds.

—and of the remaining part.

—of death of mortgagee.

—of administration to him.

—of interest and part of principal having been paid.

E. F. in part discharge of the said principal sum of £7,000, so that the sum of £5,000 only now remains due to the said E. F. on the security of the said indenture of the —— day of ——: AND WHEREAS the said I. K. hath agreed, at the request of the said G. H., to pay to the said E. F. the sum of £5,000, upon having such transfer as is hereinafter mentioned of the said mortgage debt of £5,000 remaining on the security of the said indenture of the —— day of ——, and the securities for the same, (except the said copyhold hereditaments held of the manor of F.:) AND WHEREAS upon the treaty for the said transfer it was agreed that the said copyhold hereditaments held of the said manor of F. should not be included in these presents, but that satisfaction should be entered upon the conditional surrender of the said premises made to the said [*mortgagee*] as aforesaid, to the intent that the same premises may be absolutely freed and discharged from all the principal monies intended to be secured by the said indenture of the —— day of —— (c): NOW THIS INDENTURE WITNESSETH, [*assignment of the mortgage debt and interest, supra, p.* 646:] AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement, and for the considerations hereinbefore mentioned, they the said A. B. and C. D., at the request and by the direction as well of the said E. F. as of the said G. H., (testified by their severally being parties to and executing these presents), have and each of them hath released, and by these presents do and each of them doth release, and he the said G. H. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said I. K., (in his actual possession now being by virtue of a bargain and sale thereof to him made by the said A. B., C. D., and G. H., in consideration of *5s.* apiece, &c., *supra, p.* 198), ALL AND SINGULAR the messuages, lands, hereditaments, and premises by the said indenture of the —— day of —— granted and released, or expressed and intended to be granted and released, unto and to the use of the said

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

—of agreement for transfer.

—of agreement to except part of the copyholds out of the transfer.

Witnesseth, assignment of debt.

Witnesseth,—further conveyance of the freeholds.

Parcels.

(c) A release by the deed is sometimes added, and may perhaps be desirable. (See the form, supra, p. 317).

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

theless to the rents, covenants, and agreements, by and in the said indenture of the —— day of —— [*the lease*] reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be paid, observed, and performed, and as to, for, and concerning &c., [*similar recitals for the premises comprised in the other leases thereinbefore mentioned*], and subject as to all the aforesaid premises thereby assigned, or expressed and intended so to be, to the proviso thereinafter contained and hereinafter mentioned for redemption of the same premises. And in the said indenture now in recital was contained a proviso for redemption of all and singular the said freehold, copyhold, and leasehold hereditaments, on payment by the said G. H., his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £7,000 on the —— day of ——, with interest for the same after the rate of £5 per cent. per annum in the meantime, on the days and in manner therein mentioned.

—with proviso for redemption.

—of surrender of part of the copyholds.

AND WHEREAS, at a court holden in and for the said manor of ——, on the —— day of ——, the said premises held of the said manor of ——, and by the said indenture of the —— day of —— covenanted to be surrendered as aforesaid, were duly surrendered in pursuance of the same covenant into the hands of the lord of the said manor to the use of the said [*mortgagee*], his heirs and assigns for ever, according to the custom of the said manor, subject nevertheless to a condition for making void the said surrender corresponding to the proviso for redemption in the said indenture of the —— day of —— contained and hereinbefore mentioned, [*similar recital of surrender of the other copyhold premises:*]

—and of the remaining part.

—of death of mortgagee.

AND WHEREAS the said [*mortgagee*] died on the —— day of —— intestate and a bachelor, leaving the said A. B. and C. D. his co-heiresses at law:

—of administration to him.

AND WHEREAS letters of administration of the goods and chattels, rights and credits of the said [*mortgagee*] were granted on the —— day of —— by the Prerogative Court of the Archbishop of Canterbury to the said E. F.:

—of interest and part of principal having been paid.

AND WHEREAS all interest for the said sum of £7,000 has been paid up to the day of the date of these presents, and the sum of £2,000 has been paid by the said G. H. to the said

E. F. in part discharge of the said principal sum of £7,000, so that the sum of £5,000 only now remains due to the said E. F. on the security of the said indenture of the —— day of ——: AND WHEREAS the said I. K. hath agreed, at the request of the said G. H., to pay to the said E. F. the sum of £5,000, upon having such transfer as is hereinafter mentioned of the said mortgage debt of £5,000 remaining on the security of the said indenture of the —— day of ——, and the securities for the same, (except the said copyhold hereditaments held of the manor of F.:) AND WHEREAS upon the treaty for the said transfer it was agreed that the said copyhold hereditaments held of the said manor of F. should not be included in these presents, but that satisfaction should be entered upon the conditional surrender of the said premises made to the said [*mortgagee*] as aforesaid, to the intent that the same premises may be absolutely freed and discharged from all the principal monies intended to be secured by the said indenture of the —— day of —— (*c*): NOW THIS INDENTURE WITNESSETH, [*assignment of the mortgage debt and interest, supra, p.* 646:] AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance of the said agreement, and for the considerations hereinbefore mentioned, they the said A. B. and C. D., at the request and by the direction as well of the said E. F. as of the said G. H., (testified by their severally being parties to and executing these presents), have and each of them hath released, and by these presents do and each of them doth release, and he the said G. H. hath granted, released, and confirmed, and by these presents doth grant, release, and confirm unto the said I. K., (in his actual possession now being by virtue of a bargain and sale thereof to him made by the said A. B., C. D., and G. H., in consideration of *5s.* apiece, &c., *supra, p.* 198), ALL AND SINGULAR the messuages, lands, hereditaments, and premises by the said indenture of the —— day of —— granted and released, or expressed and intended to be granted and released, unto and to the use of the said

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

—of agreement for transfer.

—of agreement to except part of the copyholds out of the transfer.

Witnesseth, assignment of debt.

Witnesseth,—further conveyance of the freeholds.

Parcels.

(*c*) A release by the deed is sometimes added, and may perhaps be desirable. (See the form, supra, p. 317).

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

[*mortgagee*], his heirs and assigns, as hereinbefore is mentioned, with their rights, easements, and appurtenances: TO HAVE AND TO HOLD the same messuages, lands, and

Habendum.

hereditaments, and all and singular other the premises hereinbefore released, or expressed and intended so to be, unto the said I. K., his heirs and assigns, to the use of the said I. K., his heirs and assigns, freed and discharged from all right or equity of redemption under or by virtue of the said indenture of the —— day of ——, but subject to the

Witnesseth,— further assignment of leaseholds.

proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements, and for the considerations aforesaid, he the said E. F., at the request and by the direction of the said G. H., (testified &c.), hath assigned, and by these presents doth assign, and the said G. H. hath assigned and confirmed, and by these presents doth assign and confirm unto the said I. K., his executors, administrators, and assigns, ALL THOSE the said messuages or

Parcels.

tenements, hereditaments and premises, by the said indenture of the —— day of —— assigned, or expressed to be assigned, to the said [*mortgagee*], his executors, administrators, and assigns, as hereinbefore is mentioned, with their rights, easements, and appurtenances: AND

Habendum.

ALL the estate &c., TO HAVE AND TO HOLD the said messuages or tenements and hereditaments, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said I. K., his executors, administrators, and assigns, henceforth for all the residue now to come respectively of the said several terms of years for which the same premises are respectively holden, freed and absolutely discharged from all right or equity of redemption, under or by virtue of the said indenture of the —— day of ——, but subject to the proviso for

Proviso for redemption.

redemption hereinafter contained, [*proviso for redemption, supra, p. 556*:] AND THIS INDENTURE ALSO

Witnesseth,— further covenant to surrender the copyholds.

WITNESSETH, that, in further pursuance of the said agreements and for the considerations hereinbefore mentioned, he the said G. H. doth hereby for himself, his heirs, executors and administrators, covenant with the said I. K. and his heirs, that the said G. H. or his heirs shall and will, at

FREEHOLDS, COPYHOLDS, AND LEASEHOLDS.

or before the next court to be holden in and for the said manor of ——, at the proper costs and charges of the said G. H. or his heirs, well and effectually surrender or cause to be surrendered, by all necessary parties into the hands of the lord or lady, lords or ladies of the said manor of ——, ALL AND SINGULAR the copyhold or customary messuages or tenements, hereditaments, and premises holden of the said manor of ——, and by the said indenture of the —— day of —— covenanted to be surrendered to the use of the said [*mortgagee*], his heirs and assigns, as hereinbefore is mentioned, with their rights, easements, and appurtenances, To THE USE of the said I. K., his heirs and assigns, to be holden of the lord or lady, lords or ladies of the said manor of ——, according to the custom thereof, and by and under the rents, fines, heriots, suits, and services therefore due and of right accustomed, freed and absolutely discharged from the said conditional surrender of the same premises made to the said [*mortgagee*], his heirs and assigns, as hereinbefore mentioned, but subject to a condition as to the said surrender to be made to the use of the said I. K. and his heirs, to correspond with the proviso for redemption hereinbefore contained: [*Covenants —by G. H. with I. K., his executors and administrators, for payment of the mortgage money and interest, supra, p.* 469*—by A. B., C. D., and E. F. with I. K., his heirs, executors, administrators, and assigns, against incumbrances, supra, p.* 654*—by G. H. with I. K., his heirs, executors, administrators, and assigns, that the leases are valid, supra, p.* 545*—for right to convey, assign, and surrender—for quiet enjoyment after default—free from incumbrances—and for further assurance—proviso for quiet enjoyment until default, supra, pp.* 560 *and* 572.—IN WITNESS &c.

Parcels.

To the use of transferee.

Covenants and provisoes.

LXXVIII.

RE-CONVEYANCE.

RE-CONVEYANCE *of Mortgaged Premises.*

Parties.

THIS INDENTURE, made &c. BETWEEN the within-named (*a*) A. B. and C. D., [*mortgagees*], of the one part; and the within-named E. F., [*mortgagor*], of the other part:

Recital of mortgage-debt remaining due, and interest having been paid.

WHEREAS the within-mentioned sum of £—— still remains due and owing to the said A. B. and C. D. upon the security of the within-written indenture, but all interest on the same has been paid up to the day of the date of these presents:

—of mortgagor's desire to have a re-conveyance.

AND WHEREAS the said E. F. is desirous of paying off the said principal sum of £——, and that the messuages, lands, and other hereditaments, with the appurtenances by the within-written indenture granted and released, or expressed and intended so to be, shall be re-conveyed unto and to the use of him the said E. F., his heirs and assigns, in manner hereinafter mentioned (*b*):

Witnesseth.

NOW

Re-conveyance by indorsement to be preferred.

(*a*) The precedent in the text is that of a re-conveyance indorsed on the mortgaged deed, but by introducing a recital of the mortgaged deed, and making the corresponding alterations in the references to it, (see supra, p. 639, n. (*a*)), the draft of a re-conveyance by an independent deed may easily be framed. It should, however, be understood, that whenever circumstances will permit, a re-conveyance should be made by indorsement, in order that when the mortgage-deed is produced, it shall necessarily bear with it the evidence of the re-conveyance; for otherwise the re-conveyance may be lost, and great difficulty may be found in proving that it was ever executed, or even that the mortgage debt has been paid. (See supra, p. 70, n. (*b*)).

When dispensed with.

A re-conveyance by an independent deed is usually made, either when it is inconvenient to send the mortgage deed to the parties who are to execute the re-conveyance, or when, from the numerous dealings which have been had with the mortgage or the equity of redemption, the re-conveyance is of a length unsuitable for indorsement.

(*b*) If the re-conveyance be to uses to bar dower, or to any other uses

THIS INDENTURE WITNESSETH, that, for effectuating the said desire, and in consideration of the sum of £—— to the said A. B. and C. D., at or immediately before the sealing and delivery of these presents paid by the said E. F., (the receipt of which said sum of £—— they the said A. B. and C. D. do hereby acknowledge, and of and from the same and every part thereof do and each of them doth acquit, release, and discharge the said E. F., his heirs, executors, administrators, and assigns, for ever by these presents), they the said A. B. and C. D. have and each of them hath released, and by these presents do and each of them doth release unto the said E. F. (in his actual possession, &c., *supra*, *p.* 198) and his heirs, ALL AND SINGULAR the messuages, lands, and other hereditaments by the within-written indenture granted and released, or expressed and intended so to be, with their and every of their rights, easements, and appurtenances, AND THE reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said messuages, lands, and hereditaments and premises hereinbefore released, or expressed and intended so to be, AND ALL the estate &c.: TO HAVE AND TO HOLD the said messuages, lands, and hereditaments, and all and singular other the the premises hereinbefore released, or expressed and intended so to be, unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns (*c*), FREED

RE-CONVEYANCE.

Consideration.

Receipt.

Re-conveyance.

Parcels.

—and the reversion, &c.

—and all the estate, &c.

Habendum.

Freed from the

---

except to the use of the mortgagor in fee-simple, the recital should run:—

" to the uses and in manner hereinafter mentioned."

The expression " re-conveyed," is, perhaps, not strictly accurate, unless the estate be actually relimited to the uses to which it stood limited before the mortgage; but it is employed in relation to the office of the mortgagee, rather than to the situation of the estate. However, " conveyed and assured" may be substituted for " re-conveyed," if deemed more correct.

(*c*) If the limitation be to any uses other than that in fee-simple, it is better to postpone the limitation till after the clause, " freed and dis-

Re-conveyance to uses.

RE-CONVEYANCE.

mortgage-debt.

and absolutely discharged of and from all principal monies and interest intended to be secured by the within-written indenture, and of and from all actions, suits, accounts, reckonings, claims, and demands whatsoever, either at law or in equity, for, upon account or in respect of the said principal monies or interest, or any part thereof respectively, or for, upon account or in respect of the within-written indenture, or of any act, deed, matter, or thing in anywise

---

charged, &c." The following form may be employed when the estate is to be re-conveyed to the uses subsisting before the mortgage:—

" to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject to which the said hereditaments and premises would now have stood limited and settled in case the within-written indenture, and the lease for a year on which the same was grounded, had not been made or executed."

If the equity of redemption has been settled, the following form may be applicable.

" to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations by and in the said indenture of the —— day of —— [*the settlement*] limited, declared, and contained, of and concerning the said hereditaments and premises, or the equity of redemption thereof, so far as the same uses, trusts, intents and purposes, powers, provisoes, and declarations are now subsisting and capable of taking effect."

Re-conveyance of copyholds.

The manner of effecting a re-conveyance of copyholds, of course, depends on the interest which the mortgagee has obtained. If he has been admitted, he must resurrender, and it is better that he should execute a deed of release, and covenant against incumbrances. If there have been a conditional surrender, but no admittance in pursuance of it, the mortgagee, on payment of the money, gives a warrant to the steward to vacate the surrender, which is thereupon at an end. The warrant is of course entered on the court-rolls. (Coote on Mortgages, 2nd edit. p. 132). There should in this case also be a deed of release and covenant. If the mortgage have rested merely on covenant, a release is sufficient. (See supra, p. 317. See, too, the remarks on mortgages of copyholds, supra, p. 565, n. (*a*); p. 568, n. (*b* ; p. 667, n. (*a*).

RE-CONVEYANCE.

Covenant by the mortgagees against incumbrances.

relating to the premises: AND EACH of them the said A. B. and C. D., so far as relates to his own acts and deeds only, doth hereby for himself, his heirs, executors, and administrators, covenant with the said E. F., his heirs and assigns, that they the said A. B. and C. D. respectively have not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whereby or by reason or means whereof the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. IN WITNESS &c.

INDEX TO THE NOTES.

A.

ABSTRACT,
delivery of, 31.
verification of, 48, 50.

ADVOWSON,
title to, which purchaser can require, 115.
disposition of presentation falling during contract for sale, 116.
mortgagee of, must present nominee of mortgagor, 117.
grant of, 296.
curtesy of, 300.
See SIMONY, PRESENTATION.

AGREEMENT,
form of, on sale by auction, 37.
general observations on, 98.
if not under seal "heirs" should not be named in, 100.
to sell at a valuation, 127.
to exercise powers, 162. *See* EXCHANGE.

APPOINTMENT,
advantages of conveyance by, 207.
effect of judgment against appointor, 207.
recital of powers of, 210.
form of, 211.
and conveyance,—form of, 212.
under power in settlement—frame of, 230.
the estate clause not used in, 232.
power of—not usually inserted in conveyances to femes sole, 249.
of new trustees, 295.
of copyholds, 316.
See POWER, USES.

APPORTIONMENT,
of rent, on sale of reversion in parts, 73.
of rent-charge on sale, in lots, 76.
of commutation rent-charges in lieu of tithes, 79.
of rents and liabilities on sale of leaseholds, held under one lease, 83.
of stamp-duty, 104.

APPURTENANCES. *See* EASEMENTS, FRANCHISES, GENERAL WORDS, PREMISES.

ARBITRATION,
reference to by trustees, executors, &c., 124.
arbitrator's decision on law, conclusiveness of, 126.
power of arbitrator to take opinions and advice, 127.
revocation of reference to, 128.
as to delivery of award, 129.
as to examination of parties and witnesses, 129.
as to examination on oath, 130.
costs of, 131.
effect of deaths of parties, 132.
reference to—should be made a rule of court, 133.
effect of its being so made, 131, 133.
effect of insertion of penalty in reference to, 134.
appointment of umpire by lot, 146, 407.
inutility of general agreements to refer to, 406.

ASSIGNEES OF BANKRUPT,
sales by, 95.
recital of sale by, 226, 227.
covenants against incumbrances by, 241, 249.
right of election as to bankrupt's leases, by, 423.
cannot claim to be indemnified against rent and covenants of bankrupt's leases, 425.
official—not to interfere in sale of property, 424.
purchase-money to be paid to, 415.
See BANKRUPT.

ASSURANCE. *See* POLICIES OF ASSURANCE, FIRE INSURANCE.

ATTORNMENT,
by mortgagor to mortgagee, 491.

AUCTION,
biddings at on behalf of vendor, 29.

AUCTION—(*continued*).
as to retracting biddings at, 29.
duty on sales by, 39.
AWARD,
conditions of sale as to title under, 58.
as to delivery of by arbitrator, 128.
See ARBITRATION.

B.

BANKRUPT,
disposition of his estate, 410, 411.
sale of his estate, 411, 414,
entailed estates, 414.
copyhold estates, 414.
mortgaged estates, 415, 418.
disposition of his leasehold estates, 422, 424.
See ASSIGNEES.
BARGAIN AND SALE. *See* LEASE FOR A YEAR.
mode of framing, 219.
operation of under a power, 196.
of copyholds by executors under a power, 320.

C.

CESTUI QUE VIE,
evidence of age of, 88.
CHILDREN,
effect of gift to all, to vest at twenty-one, 171.
CHOSES IN ACTION,
wife's. *See* HUSBAND AND WIFE.
assignment of—to be perfected by notice to legal holder, 374.
what inquiries are necessary before taking, 376.
effect of misrepresentation as to by legal holder of, 377.
power of attorney in assignment of, 605.
See POWER OF ATTORNEY.
CHURCHWARDENS. *See* PARISH.
COLLATERAL SECURITIES,
propriety of preparing by separate deeds, 617.
comprising policy of assurance, 623.

COMPANY,
conveyance to, observations on, 438—440.
joint stock—mortgages to, 507, 521.

COMPENSATION,
on purchase, 33.
as to clauses for submitting to arbitration in conveyances reserving mines, 406.

CONDITIONS OF SALE,
general observations on, 27.
as to evidence of title, 54, 55.
as to length of title, 56, 57.
as to evidence of seisin, 57.
for titles under awards, 58.
exchanges, 59.
crown grants, 59.
manorial grants of waste, 60.
to strips by road-side, 60.
when purchaser is to take such title as vendor has, 61.
by trustees, mortgagees, and assignees, 95.

CONSIDERATION,
description of, 195.
to be stated entire in first witnessing part, 259.
exception to the rule, 655.
payment of when recited, 325.

COPYHOLDS,
purchaser of, has notice of the customs relating to, 102.
forms of assurance of, 304—307.
description of, 307.
at what court they must be surrendered, 311.
situation of parcels in assurances of, 313.
creation of powers in, 316.
satisfaction of mortgages of—to be entered on court rolls, 319.
bargain and sale of by executors under power, 320.
creation of term of years in, 329.
recital of their having been surrendered to use of will, 349.
mines under—to whom they belong, 397.
bankrupt's—sale of, 414.
mortgages of, 565.
mortgages of the equity of redemption of, 600.
admittance to—relates back to the surrender, 568.

COPYHOLDS—(*continued*).
mortgagee of—may file a bill for foreclosure before admittance, 568.
assignment of equitable interest in, 667.
transfer of mortgages of, 645, 667, 671.
re-conveyance of when mortgaged, 687.

CONVEYANCE,
to be prepared by and at cost of purchaser, 33.
in fee—merits of, compared with conveyance to uses to bar dower, 207—249.
by appointment and release, 212.
under sale in Chancery, 236, 238, 239.
by infant heirs, and devisees on sale for payment of debts, 238.
to trustees—recitals in, 242.
to railway and canal companies, 438—440.
for parish purposes, 446.
of copyholds, 304, 307.
See APPOINTMENT.—BARGAIN AND SALE, EXCHANGE, FEOFFMENT, LEASE.

COVENANTS,
in lease—evidence of performance of, 82.
purchaser has notice of, 82.
assignee of lease must indemnify against, 339.
proper words of, 201.
intended to operate by estoppel—form of, 202.
by distinct parties—how to be worded, 202.
by trustees, 232.
against incumbrances, 241, 249.
to produce title-deeds, 46.
of manor on enfranchisement, 279.
with tenants in common, 345.
by tenants in common, purchasers of leaseholds, 346.
covenant to pay, not qualified by a covenant to indemnify, 389.
in mortgage for payment of principal and interest, 469—471.
by mortgagors when more than one in number, 545.
See COVENANTS FOR TITLE, COPYHOLDS.

COVENANTS FOR TITLE,
whether an obligation to enter into is implied by an agreement to convey, 33.
to whose acts they extend, 201.
chain of—usually defective, 202.

COVENANTS FOR TITLE—(*continued*).
language of, 204.
do not run with the land—when, 232, 263.
with whom they should be entered into, 232, 263, 288.
by joint tenants, 297.
by tenants in common, 297.
with tenants in common, 345.
should be absolute—when, 300, 303.
on sale of copyholds—whether they run with the land, 305.
in mortgages, 471.
for further assurance in mortgages, 473.
See COVENANTS.
CROWN,
conditions of sale, as to title under grant from, 59.
CUSTOMS.—*See* MANOR.

D.

DAMAGES LIQUIDATED.—*See* PENALTY.
DEBTS,
sale for payment of, 238.
DECREE,
sales under, 92, 93.
conveyance on sale under, 236, 238, 239.
distinguished from decretal order, 237.
DEEDS.—*See* TITLE-DEEDS.
DEFAULT,
neither purchaser nor vendor to take advantage of his own, 63.
in payment of mortgage monies—recital of, 247.
proviso in mortgage for quiet enjoyment until, 474.
DEPOSITS ON PURCHASE,
law respecting, 30.
forfeiture of, 35.
investment of, 40.
DOWER,
mode of barring under the act 3 & 4 Will. 4, c. 77, 197.
by limitation to uses, 205.

E.

EASEMENTS,
law relating to, 213.

EASEMENTS—(*continued*).
the right to light, 240.
the right to pews, 273.
vaults or burial places, 275.
tombs and monuments, 276.
See GENERAL WORDS.
ENFRANCHISEMENT,
nature of, 276.
frame of, when lord is seised in fee, 276.
effect of, 277.
should be enrolled, 277.
should contain a re-grant of commons, 278.
unless it be made under a power, 437.
how its effect should be qualified, 278, 438.
operation of power of, 435—437.
EQUITY OF REDEMPTION,
mortgage of, 597, 627.
mode of charging, 621. *See* MORTGAGE.
ESTOPPEL,
by recital, 192.
at law—by receipt in deed, 194.
but not by indorsed receipt, 195.
by receipt—not allowed in equity, 195.
EVIDENCE,
of title—conditions of sale as to, 54, 55.
of seisin—conditions of sale as to, 57.
of performance of covenants of leases, 82.
of age of cestui que vies, 88.
See RECITAL, CONDITIONS OF SALE, ARBITRATION.
EXCHANGE,
conditions of sale as to title under, 58.
remarks on agreement for, 134.

F.

FEME COVERT. *See* HUSBAND AND WIFE.
FEOFFMENT,
mode of framing, 218.
FINE,
mode of reciting, 221.

FIRE INSURANCE,
law relating to, 499.
application of monies received under, for mortgaged property, 515, 662.
covenants relating to, in mortgages of leaseholds, 548.
no stamp-duty on advances for keeping up, 662.

FIXTURES,
between vendor and purchaser, 41.
price of—blended with purchase-money, 226.
mortgages of, 501—503.

FRANCHISES,
appurtenant to manors, 231.

FURTHER CHARGE,
recital of, 341.
manner of preparing, 639.
See MORTGAGE, EQUITY OF REDEMPTION.

G.

GENERAL WORDS,
what they include, 108, 199.
law relating to, 213.
for manors, 231.
in appointments, 232.
for houses in towns, 240.
include pews, 275.
for leases, 335.
See EASEMENTS.

GOODWILL,
remarks on sale of, 387.
See TRADE, POWER OF ATTORNEY.

GUARDIAN,
his authority over infant's lands, 109.

H.

HABENDUM,
form of, 200.
not appropriate to a surrender, 271.
when two are used for one witnessing part, 590.

HUSBAND AND WIFE,
assignment and release by husband of wife's choses in action, 176, 181.
wife's equity to a settlement, 177.
their power over wife's contingent reversion in real estate, 178.
life interest in personalty, 179.
reversionary terms of years, 180.
husband's right to wife's choses in action by survivorship and as administrator, 180.
reduction into possession of wife's choses in action by husband —what is, 181.
on sale of wife's estate she should join in lease for a year, 428.

I.

IDENTITY,
necessity of conditions as to, 67.
modes of proving, 67.

INCUMBRANCES,
indemnity against on purchases, 68.
land-tax is not an incumbrance, 193.
specification of in covenants for title, 204.
covenants against by trustees, 241.
how to be kept on foot for benefit of purchaser, 251.

INDEMNITY,
between vendor and purchaser, 33, 68.
by assignee of lease to assignor, 339.
on assignments of bankrupt's leases, 425.

INFANTS,
conveyance by on sale for payment of debts, 238.
by infant trustees and mortgagees, 672, et seq.
See GUARDIAN.

INSTALMENTS,
mortgage-money to be discharged by, 594.

INSURANCE. *See* POLICIES OF ASSURANCE, FIRE INSURANCE.

INTEREST,
on purchase-money, 30.
covenant for payment of on mortgage-money, 470.
compound—not allowed in mortgages, 510.
due on mortgages may be made principal, 511.

INTEREST—(*continued*).
conversion of into principal on transfers of mortgages, 651.
on mortgage-debts generally, 510, 513.
on a prior advance to be paid up to the date of the mortgage, 154, 541.
provision in mortgage for reducing rate of, 559.
on a mortgage-debt payable by instalments, 594.
as to payment of on transfers of mortgages, 652.
INVENTION,
Agreement to keep secret, 187.
See PATENT.

J.

JUDGMENTS.
how affected by an appointment under a power, 207.
against tenant for life—how they affect the exercise of a power of sale, 228.

L.

LAND TAX,
not to be excepted as an incumbrance, 193.
LEASE,
vendor of bound to procure lessor's title, 80.
except in the case of ecclesiastical leases, 81.
as to conditions on sale of underlease, 81.
purchaser of has notice of covenants in, 82.
apportionment of rents and liabilities among purchasers of properties held by the same lease, 83.
assignee of bound to indemnify assignor against the rents and covenants in, 86, 339.
except on sales by assignees of bankrupts, 425.
equitable title to renewed lease, 88.
for lives—evidence of age of cestui que vies, 88.
recital of, 333, 583.
recital of lease subsequently renewed, 552.
recital of title to, 334.
operative words in assignment of, 335.
general words for, 335.
covenants by tenants in common, purchasers of, 346.
disposition of on bankruptcy, 422, 424.
created by proviso in mortgage for quiet enjoyment until default, 474, 497.

LEASE—(*continued*).
by mortgagor and mortgagee, 491.
mortgage of—whether to be made by underlease or assignment, 537.
as to provision for fire insurance in mortgage of, 548.
words which would create an estate-tail in freeholds give the absolute interest in, 553.
provision in mortgage for the renewal of, 563.
condition not to assign without licence—how restored, 585.
LEASE FOR A YEAR,
frequently missing, 51.
utility and frame of, 199.
married woman should join in on conveyance of her estate, 428.
LEGACIES,
to children—ademption of, by portions, 170.
to children—vesting of, 171.
duty on—when payable out of real estate, 578.
LETTERS PATENT,
law respecting, 182.
recital of, 184.
remedy for infringement of, 189.
not to be vested in more than five persons at once, 361.
See PATENT, INVENTION.
LICENCE,
condition in a lease against assignment without, how restored, 385.
LIFE INTEREST,
remarks on sale of, 89.

M.

MACHINERY,
mortgages of, 501 et seq.
MANOR,
purchaser of copyhold has notice of custom of, 102.
what acts must be done within, 311.
courts of, distinguished, 311.
satisfaction of mortgage to be entered on rolls of, 318.
MINES,
law relating to, 393—398.
exception of from conveyance, 399, 400.

MINES—(*continued*).
restrictions on working excepted mines, 405.
inutility of general clauses for reference to arbitration respecting, 406.
MISREPRESENTATION,
in particular of sale—effect of, 34.
by legal holders of choses in action—effect of, 376.
MISTAKE,
purchase by, 30.
MONEY. *See* CONSIDERATION, MORTGAGE.
MORTGAGE,
frame of, where the debt is made up of several loans, 155.
by deposit of title deeds, 156.
of leases, 159.
bonds, policies, &c., 160.
general remarks on construction of, 463.
remarks on the recital of the contract in, 464.
on referring to proviso for redemption in, 465.
operative words of, 466.
as to specifying an hour and place of payment, 467.
to whom the money should be made payable, 467.
form of proviso for redemption, 467.
effect of proviso for redemption in revoking wills, 467.
as to covenant for payment of principal, 469, 471.
and interest, 470.
utility of bonds and warrants of attorney, 470.
as to the time and mode of payment after default, 470.
computation of time by calendar months in, 488.
covenants for title in, 471.
covenant for further assurance in, 473.
effect of proviso for quiet enjoyment until default, 474.
power of sale in—validity of, 245.
general remarks on, 475, 477, 478.
power of sale to two or more mortgagees, 486.
to mortgagees on a joint account, 480.
to trustees, 480.
attornment in, 491.
power of leasing in, 492.
for a time certain, 497.
of machinery, 501.
of fixtures, 501, 503.
to a joint-stock company, 507, 521.

MORTGAGE—(*continued*).
interest on—how regulated, 510—513.
to or by partners, 521—523, 602.
construction of, where different mortgagees advance distinct sums, 524, 536.
of leaseholds—when to be made by under-lease, and when by assignment, 537.
disposition of reversion after a sale under a power in a mortgage of leaseholds by under-lease, 550.
proviso in for reducing rate of interest, 561.
provisions in for renewal of leases, 563.
of copyholds, 565.
of the equity of redemption of copyholds, 600.
for years or in fee—comparative advantages of, 574.
for securing and raising portions, 574.
to be paid by instalments—form of, 594.
of an equity of redemption, 597.
of a reversionary interest, 603, 609.
of policies of assurance, 610, 615, 619.
collateral securities for, 617, 623.
of equitable interests, 621.
as to appointment of a receiver in, 631, et seq.
re-conveyance on discharge of, 684—687.
See EQUITY OF REDEMPTION, MORTGAGEE, MORTGAGOR, RECEIVER, TRANSFER OF MORTGAGES.

MORTGAGEE,
his authority for making conditions of sale, 95.
manner of sale by—to be recited, 226, 227.
covenants against incumbrances by, 241, 249.
release to by mortgagor, 266.
is a trustee for mortgagor, 475.
power of sale to two or more mortgagees, 486.
attornment to by mortgagor, 491.
leases by, 492.
to be exempted from any arrangement as to primary or secondary liability of securities, 536.
of copyholds may file a bill for foreclosure before admittance, 568.
provision for re-payment to, of premiums on assurances, 615.
cannot charge for trouble in collecting rents, 631.
but may appoint a receiver, Id.

MORTGAGEE—(*continued*).
may stipulate for appointment of a receiver, 632.
as to his not joining in appointment of a receiver, 634.
whether liable for default of receiver, 633, 638.
conveyance by infant heir of, 672, et seq.
lunatic or idiot, Id.

MORTGAGOR,
his concurrence in conveyance under power of sale, 245.
release by to mortgagee, 266.
effect of his bankruptcy, 415—418.
attornment by to mortgagee, 491.
leases by, 492.
as to primary liability between two mortgagors, 536.
covenants by two or more, joint and several, 545.
usually alone appoints receiver, 634.
transfer of mortgage after death of, 644.

N.

NOTICE,
to legal holder necessary to perfect assignment of choses in action, 374.
law respecting such notice, 374—376.

O.

OPERATIVE WORDS,
tense of, 195.
usual, 196.
of surrender, 262.
in grant of advowson, 296.
of release, 318.
in leases, 335.
in mortgages, 466.

P.

PARCELS,
mode of reference to, 209.
when described in recitals, 210, 506.
situation of, 212.
in assurances of copyholds, 312.
leaseholds, 333, 552.

PARCELS—(*continued*).
description of houses in towns, 240.
by maps and schedules, Id.
in grant of advowson, 296.
description of copyhold, 307.
when the lands of different tenures cannot be distinguished, 354.
mode of describing in assignments of terms, 457.
situation of, in transfers of mortgages, 645.

PARISH,
conveyances for purposes of, 442.
effect of statute, 59 Geo. III. c. 12, on lands of, 442.

PARTIES,
to instruments—the order of, 98.
persons made more than once, if filling different characters, 255.

PARTNERSHIP,
land purchased by, is personal estate—when, 509.
effect of a change of partners on securities given to or by a firm, 521, 523.
mortgages to partners, 602.

PATENT,
specification of, 185.
agreement to keep invention secret, 187.
partnership in, 190.
See LETTERS PATENT, INVENTION.

PENALTY,
distinguished from liquidated damages, 111.
as to making one for the non-performance of an agreement consisting of distinct parts, 134.

PEWS,
law respecting, 273—275.

POLICIES OF ASSURANCE,
against loss by fire. *See* FIRE INSURANCE.
on lives—law relating to, 90, 367.
bonuses on follow the principal, 371.
notice to be given on assignment of, 374.
mortgages of, 610, 615, 620.
should be effected in name of mortgagee, 619.
in collateral securities, 623.

PORTIONS,
mortgages for raising, 574.
POWER OF ATTORNEY,
form of, 253.
when given for valuable consideration revocable only by death of principal, 384, 637.
to do an act implies necessary authorities, 384.
to receive debts does not authorize indorsement of bills, 385.
required only when the remedy is legal, 605.
in transfers of mortgages, 647.
POWER,
agreement to exercise, 162.
mode of reciting the creation of, 210.
exercising, 211.
when coupled with interest, 212.
frame of in limitation to uses to bar dower, 214.
of sale and exchange—the exercise of how affected by judgments against tenant for life, 228.
of sale in settlement—mode of exercising, 230.
of sale in mortgage, validity of, 245.
general observations on, 478.
mortgagor's concurrence in, 245.
recital of, 247.
manner of exercising, 248.
the surplus purchase-money under sale by virtue of is real estate, 477.
not to be assigned on transfer, 645.
to two or more mortgagees, 486.
of appointing new trustees, 295.
copyholds, 316.
of leasing in mortgage, 492.
See APPOINTMENT, USES.
PREMISES,
meaning and application of the word, 200.
include the appurtenances, 200.
except where there are two sets of parcels, 264.
PRESENTATION,
to living, nature of next presentation, 114, 115, 301.
title to, which purchaser can require, 115.
disposition of, if it fall during a contract for sale, 116.
sale of next presentation, 300.

PRESENTATION—(*continued*).
covenants for title in grant of next presentation, 300.
See SIMONY, ADVOWSON.
PRESUMPTION,
of surrender of terms, 65.
of satisfaction of mortgages, 70.
as to legal estates between vendor and purchaser, 71.
of apportionment of rent-charge, 77.
PROBATE,
when to be recited, 148.
PROVISO FOR REDEMPTION,
frame of when equity of redemption is settled, 357.
mode of referring to in mortgage, 465.
form of, 468.
effect of in revoking prior will, 468.

R.

RECEIPT,
in deed is an estoppel at law, 194.
no receipt an estoppel in equity, 195.
power of trustees to give, 293.
executors to give, 321.
RECEIVER,
may be appointed by mortgagee, 631.
or by a court of equity, 632.
the appointment of may be stipulated for by mortgagee, 632.
convenience of appointment of at the time of the mortgage, 633.
powers, duties, and liabilities of when appointed by deed, 633, 635, 636.
as to mortgagee not joining in appointment of, 634.
defaults of—as to mortgagee's liability for, 638.
liability of for involuntary losses, 639.
appointment of dormant, 639.
RECITAL,
not evidence except by special stipulation, 54.
informal, 106.
of death of testator and probate of his will, 148.
of no re-publication of will, 257.
of will, 320.
of letters patent, 182.

RECITAL—(*continued*).
in assignment of letters patent, 363.
in purchase-deed—of vendor's seisin in fee, 192.
estoppel by, 192.
of contract, whether for sale or purchase, 193, 439.
general rules for, 207.
parcels to be described in—when, 210.
of instrument creating power, 211.
of fines and recoveries, 221.
of limitations and clauses of settlements, 222.
of re-conveyance of legal estate, 224.
of mode of sale—when inserted, 225, 227.
of Chancery proceedings, 236.
on purchases by trustees, 242.
of transfer of mortgage, 246, 341.
of power of sale in mortgage, 247.
in conveyance, of a desire to have the estate specially limited, 259.
as to mortgage-debts, 247, 314.
of payment of consideration, 324.
of leases, 333, 583.
of lease which has been subsequently renewed, 552.
of title to leases, 334.
of surrender of copyholds to use of will, 351.
of purchase by or sale to a company, 439.
in assignment of attendant terms, 449, 452, 453, 456.
of contract for loan in mortgage, 464.
observations on irregular, 604.

RE-CONYEYANCE,
of mortgaged property should be by indorsement, 684.
application of the term, 685.
of mortgaged copyholds, 687.

RECOVERY,
mode of reciting, 221.

RELEASE,
by mortgagor to mortgagee, 266.
of quit rents, 279.
of part of land charged with rent-charge, 431.

RENT-CHARGE,
on the sale in lots of lands subject to, 75, 77.

RENT-CHARGE—(*continued*).
in lieu of tithes, 79.
release of part of the land charged with, 431.
REPUTED OWNERSHIP,
of chattels personal, 501.
REVERSIONS,
remarks on sale of, 89.
in a fund—mortgage of, 603, 609.

S.

SATISFACTION,
of charges—presumption of, 70.
of mortgages of copyholds to be entered on court-rolls, 318.
SEISIN,
conditions of sale as to evidence of, 57.
in fee of vendor—recital of in purchase-deed, 192.
SETTLEMENT,
manner of reciting, 222.
power of sale in—mode of exercising, 230.
frame of conveyance to uses of, 281.
tenant for life under, may deal with trustees of power of sale and exchange, 287.
SIMONY,
what constitutes, 113.
See ADVOWSON, PRESENTATION.
STAMP-DUTY,
apportionment of, 104.
on advances by mortgagee for insurances, 523, 662.
on transfers of mortgages, 643.
SURRENDER,
operative words of, 261.
should have no habendum, 271.

T.

TENANT FOR LIFE,
may deal with trustees for sale and exchange, 287.
sale by, of next presentation, 300.

TERMS OF YEARS,
cost of deducing title to and assigning, 64, 449.
presumption of surrender of, 65.
in copyholds, 329.
structure of assignments of, 449, 452, 453.
mode of describing parcels in assignments of, 457.
to what cases the protection of extends, 459.
form of assignment of terms in different trustees, Id.
loan for a term of years, 497.
mortgages for, 574.

TIMBER,
agreement for sale of standing, 118, 119.
price of blended with purchase-money, 226.

TIME,
for purchaser's requisitions—effect of limiting, 43.
may be made the essence of the contract, 44.
for payment of mortgage-money—how specified, 466.
for payment and foreclosure between mortgagor and mortgagee, 470.
computation of, in mortgages by calendar months, 488.
mortgage for a time certain, 497.

TITHES,
evidence of modus and exemptions from, 78.
rent-charge in lieu of, 79.
merger of, 440—448.

TITLE,
expense of making out falls on vendor, 49.
defective, the costs of investigating to be paid by vendor, 62.
how to be paid on sale under decree, 93.
lessor's—must be produced on sale, 80.
length of which purchaser can require, 56, 57.
to advowson, 115.

TITLE-DEEDS,
custody of, 44—51.
on sale in lots, 52, 53.
covenant for production of, 46.
on enfranchisement, 279.
right to drafts and copies of, 50.

TITLE-DEEDS—(*continued*).
expense of examination of, 45.
attested copies of, 47.
presumption as to execution of when lost, 51.
mortgage by deposit of, 156.

TRADE,
restraints on, how far valid, 390—392.

TRANSFERS OF MORTGAGES,
recital of, 246, 341.
law relating to, 643.
methods of effecting, 643—645.
stamp-duty on, 643.
power of sale not to be assigned on, 645.
to be taken by indorsement, Id.
locus of parcels in, Id.
power of attorney in, 647.
as to conversion of interest into principal on, 651.
as to the date of, 652.
of copyholds, 645, 667, 671.

TRUST,
for sale, manner of framing, 290—293.
how to be exercised, 290.
in mortgage undesirable, 478.
where created by words of recommendation, 351.

TRUSTEES,
their authority for making conditions of sale, 95.
manner of sale by, to be recited, 226, 227.
covenants against incumbrances by, 241, 249.
recitals on purchases by, 243.
with power of sale and exchange may deal with tenant for life, 287.
for sale, their power to sell in lots, 290.
how they should sell, Id.
their power to buy in and rescind contracts, 291.
give receipts, 293.
appointment of new, 295.
indemnity and reimbursement of, 295.
mortgages by, 480.
powers of sale in mortgages by, 486.
conveyance by infant and lunatic, 238, 672, et seq.

U.

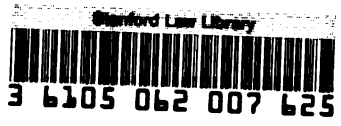
UMPIRE,
cannot be appointed by lot without special authority, 146, 407.
See ARBITRATION.

UNDER-LEASE,
as to conditions of sale of, 537.
when mortgage of lease to be made by, 537.
"all the estate" clause not inserted in, 542.
disposition of reversion after sale under a power in mortgage by, 550.

USES,
utility of stipulation that vendor shall convey to such as purchaser shall appoint, 101.
limitation to bar dower, 205.
the use limited in fee, when purchaser is a feme sole, 249.
limitation to, whether to be noticed in recitals, 259.
See POWER, APPOINTMENT.

W.

WASTE,
conditions of sale as to title to inclosures from, 60.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